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WASHINGTON REPORTS

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IN THE

SUPREME COURT

OF

WASHINGTON

JUNE 10, 1910—SEPTEMBER 3, 1910

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OF THE

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† Judge Canfield resigned Aug. 9, and was succeeded by Judge Pickrell.

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ERRATA

Page 33, 4th syllabus, line 4, for in read to
Page 336, 2d syllabus, line 6, for owed read owned
Page 436, 2d syllabus, last line, for defendant read plaintiff
Page 556, 2d syllabus, line 3, for sold read cold

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 8182. Department Two. June 10, 1910.]

SKAGIT COUNTY, *Respondent*, v. AMERICAN BONDING COMPANY OF BALTIMORE, *Appellant*, ALLEN BLUMBERG, *as Administratrix*, *Defendant*.[1]

LIMITATION OF ACTIONS—OFFICIAL BONDS—ACCRUAL OF ACTIONS. The statute of limitations applicable to an action on the official bond of a county officer, for various defalcations and misappropriations of funds which were not known to the county during his term of office, does not begin to run as against the county until the expiration of the term of office for which the bond was given.

SAME—ACTION FOR FRAUD—DISCOVERY. Subdivision 4 of Rem. & Bal. Code, § 159, providing that a cause of action for fraud does not accrue until the fraud is discovered, applies to actions on the official bond of a county officer for embezzlement of funds, under a strict construction of said section.

COUNTIES—OFFICERS—OFFICIAL BONDS — BREACH — VIOLATION OF DUTY. A compensated surety on the official bond of a county auditor cannot make the defense that the auditor's receipt and conversion of license fees properly payable to the treasurer, his issuance of illegal warrants, and his forgeries by the raising of warrants, were merely private acts and not official acts constituting a breach of his bond, where they were breaches of his official duty as auditor and could not have been successfully perpetrated as a private citizen.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 8, 1909, upon findings in favor of the plaintiff, in an action upon an official bond, after

[1]Reported in 109 Pac. 197.

a trial on the merits before the court without a jury. Affirmed.

Blattner & Heasty and *L. B. da Ponte*, for appellant.

Augustus Brawley, for respondent.

Crow, J.—Fred Blumberg, now deceased, was elected auditor of Skagit county in November, 1902, and on December 20, 1902, he, as principal, and the American Bonding Company of Baltimore, Maryland, a corporation, as surety, executed and delivered to Skagit county an official bond in the sum of $10,000, containing the following condition:

"The condition of the above obligation is such that whereas the above bounden Fred Blumberg was on the 4th day of November, 1902, duly elected to the office of County Auditor in and for Skagit county, State of Washington:

"Now therefore, if the said Fred Blumberg shall well and truly perform all of the duties required of him by law as county auditor of Skagit county, Washington, aforesaid, and shall faithfully discharge all duties which may be required of him by any law enacted subsequent to the execution of this bond, then this obligation shall be void, otherwise to remain in full force and effect."

Blumberg took possession of his office, entered upon its duties, and served as auditor for the full term ending in January, 1905. This is an action upon his official bond against the bonding company, and Allen Blumberg, as administratrix of his estate, to recover for his defalcations and embezzlements. Upon findings made, a final judgment for $7,756.19 was entered in favor of the county. The bonding company has appealed.

The numerous items included in this judgment may be classified as follows: (1) Fees collected and not accounted for; (2) warrants fraudulently issued without authority or consideration, and paid by the county; (3) warrants raised by Blumberg after their authorized issue, and paid by the county; (4) a liquor license fee paid by one Nixon and appropriated by Blumberg to his own use.

Many of Blumberg's alleged acts of misconduct were committed more than three years prior to the commencement of this action. The evidence shows that he was reelected in 1904; that he served a second term which expired in January, 1907; that immediately thereafter his books were experted, when his various wrongful acts were discovered, and that at no prior time did the respondent have any actual knowledge thereof. This action was commenced on June 14, 1907. The appellant contends that the auditor's books at all times afforded evidence of his defalcations, embezzlements, and other fraudulent acts; that the respondent had ample facilities for discovering the facts; that its failure to do so resulted solely from its own negligence; and that the causes of action pleaded in the complaint, in so far as they are predicated upon Blumberg's acts committed more than three years prior to the commencement of this action, are barred under sul division 3, § 159, Rem. & Bal. Code. In support of these contentions appellant cites *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. 733. In that case it became the statutory duty of Prescott, on the expiration of his term of office as treasurer, to turn over to his successor all moneys of Spokane county with which he was then charged. The exact time for the performance of that duty was fixed by law, as occurring at the expiration of his term. He failed to perform that duty. The cause of action then accrued, and this court held that the three-year statute was applicable; that it then began to run, and that the cause of action was barred.

Blumberg's first term expired in January, 1905. When he entered upon his second term he gave a new bond, and again qualified as auditor. The two terms were separate and dis-

It might well be held that, as to all causes of action based upon wrongful acts occurring during his first term, the statute of limitations began to run at its expiration in January, 1905. A county official might be guilty of numerous distinct acts of embezzlement or misappropriation of

funds during his term of office, but it would be impractical to hold that the statute would run as to each wrongful act from the date of its commission, simply because it might have been then discovered by an expert examination of his books. It should rather be held that, for the purposes of the statute of limitations, all causes of action matured at the expiration of his term, for defalcations during such term, without reference to the several dates on which they occurred, and that as between the county on the one part, and the delinquent officer on the other, the period of limitation would not commence to run prior to the expiration of his term. The construction of the statute adopted by this court in the *Prescott* case was a liberal one in favor of the defaulting officer. We do not desire to extend the doctrine there announced by any more liberal construction in favor of the appellant here. Blumberg's wrongful acts were committed while he was in complete possession of his office, and was afforded an opportunity for dishonest and fraudulent acts, of which, as an unfaithful officer, he availed himself to respondent's injury. To now hold that the statute of limitations began to run as against each act, from the date of its commission, instead of the expiration of his term, would result in making it more difficult to hold a defaulting officer or recover from his bondsmen, especially where, as in this case, he was reelected and served a second term, before his delinquencies were actually discovered. We feel constrained to hold that the causes of action matured with reference to the statute of limitations, at the expiration of the term of office.

There is nothing here to disclose when many of Blumberg's embezzlements actually occurred, although the dates of others are shown. Appellant contends that, because Blumberg should have turned over all moneys received by him as soon as collected, he at once became a defaulter, and that the causes of action immediately accrued so as to start the running of the statute. The difficulty with this contention is that none of the defalcations were actually discovered by

respondent until February, 1907. Blumberg neither desired nor intended that his acts should become known if he could avoid it, nor was he disposed to lend aid to their discovery. Action was promptly commenced by the respondent after discovery. If the strict construction for which the appellant contends should be adopted as to subdivision 3 of § 159, Rem. & Bal. Code, then the contention of respondent, predicated upon subdivision 4 of the same section, to the effect that the cause of action originated in fraudulent acts of Blumberg, that it cannot be held to have accrued until discovery of the facts by respondent, and that the action was commenced in time, would necessarily have to be sustained. In any event the action was commenced in time as to all items claimed.

Appellant has excepted to a number of the findings made by the trial judge. Without discussing the evidence, which is largely documentary, we conclude that they must be approved, and that they sustain the final judgment. Further contention is made to the effect that, even on the findings made, the appellant is not liable as surety for Blumberg; that the wrongful acts alleged, proven, and found, were not of such a character as to constitute any violation of Blumberg's official duties; or rather that they were not official acts, but were acts which he performed as an individual in his capacity as a private citizen. It appeared that on June 4, 1903, Blumberg presented to the board of county commissioners the application of one Frank Nixon, for a retail liquor license, accompanied by a written receipt of the county treasurer dated May 19, 1903, for $300, the cost of the license; that the license was thereupon issued; that Nixon had paid the money to Blumberg instead of the county treasurer; that Blumberg appropriated it to his own use; that he wrongfully and fraudulently changed the date of a previous receipt given by the treasurer for a former liquor license, and presented it to the commissioners with the application of Nixon made in 1903, thus procuring the license; that the money

actually paid by Nixon was never received by the county, although the license was issued.

It further appears that Blumberg issued many warrants on road funds and other funds of Skagit county to various persons therein named; that he indorsed the names of the payees thereon by himself as county auditor; that they were paid by the county treasurer; that no county indebtedness existed as a consideration for such warrants, and that they were never authorized by the board of county commissioners. It further appeared that in many instances warrants were lawfully issued for indebtedness actually due from the county to the payee; that Blumberg procured the indorsement of these warrants by paying their face value to the holder; that he thereafter raised them so that they called for larger sums than when originally issued, and that the warrants as thus raised were paid by the county. The appellant now contends that these various acts were not done by Blumberg as county auditor; that when Nixon paid the $300 to Blumberg instead of making payment to the treasurer, he, Nixon, constituted Blumberg his agent to pay the treasurer; that Nixon, therefore, has never paid the license fee to the county, and that respondent's claim is against him instead of Blumberg.

Appellant further claims that the fraudulent and unauthorized issue of the warrants without consideration was not the act of Blumberg as county auditor, and that when he raised the other warrants he had in fact purchased them in his individual capacity, and that his acts in so raising them were not official acts, but forgeries. There is no question but that the various acts performed by Blumberg of which the respondent now complains were unauthorized; that they were not contemplated as a part of his official duties, and that they were illegally performed for his personal and private benefit. The appellant, however, executed a bond on his behalf, to secure the faithful performance of his duties as county auditor in every respect. The acts complained of were a violation of his duties as county auditor. Had he been a private

citizen not holding any official position he could not have successfully perpetrated any of the frauds charged in the complaint. The fact that he was county auditor, had possession of the records of the office, the blanks upon which warrants were to be issued, the receipt the date of which was raised, and the other documents which he used in perpetrating these frauds, enabled him to perform acts of embezzlement, misappropriation, and dishonesty which he could not have performed as a private citizen. By executing a bond upon his behalf, the appellant contracted that he would be a faithful, honest, and efficient officer, and that he would conscientiously discharge all the duties devolving upon him. The duty devolved upon him not to make use of any of these blanks, books, records, or documents for the purpose of perpetrating a fraud and benefiting himself. Although it is contended with much force that these were not strictly official acts, they were nevertheless wrongful, dishonest, and unfaithful acts which he performed while county auditor, which he could not have performed without being auditor, and which have resulted in great financial loss to the respondent. We think, therefore, that no technical or specious arguments to avoid liability on the part of the appellant, a compensated surety, should be given any serious consideration, when such arguments are based solely upon the contention that acts such as these were not performed by Blumberg as auditor.

The judgment is affirmed.

Rudkin, C. J., Dunbar, Parker, and Mount, JJ., concur.

[No. 8436. Department Two. June 10, 1910.]

SKAGIT COUNTY, *Plaintiff and Appellant*, v. AMERICAN BONDING COMPANY OF BALTIMORE, *Defendant and Appellant*.[1]

COUNTIES — OFFICERS — DUTIES—LIQUOR LICENSES — PAYMENT OF FEES. Rem. & Bal. Code, §6263, requiring liquor licenses to be paid "annually in advance to the county treasurer, who shall pay ten per cent of the amount into the state treasury" does not require the licensee to personally pay the county treasurer before issuance of the license is ordered by the county commissioners; but the same is to be paid to the treasurer by the auditor with whom the fee is deposited upon making application, after the application is granted.

COUNTIES—OFFICERS—DUTIES—OFFICIAL BONDS. Under Rem. & Bal. Code, § 3917, subd. 9, directing the county auditor, as clerk of the board of county commissioners to "perform all other duties required by law or any rule or order of the board," it is a breach of the auditor's official bond to embezzle liquor license fees deposited with him as clerk of the board, after he had been ordered by the board to issue the licenses and pay the fees over to the county treasurer.

SAME. The embezzlement by the county auditor of fees for recording marriage licenses, paid to him by reason of his official position, although there was no law authorizing him to receive the same, is a breach of his official bond for which his surety is liable; but the recovery must be limited to the fees received during the term of office covered by the bond.

Cross-appeals from a judgment of the superior court for Skagit county, Joiner, J., entered January 11, 1909, upon findings in favor of the plaintiff, in an action on an official bond, after a trial on the merits before the court without a jury. Modified.

Augustus Brawley, for plaintiff.

F. S. Blattner and *L. B. da Ponte*, for defendant.

CROW, J.—This action in many respects grows out of the same state of facts involved in cause No. 8182, *Skagit County*

[1]Reported in 109 Pac. 199.

v. American Bonding Co., ante p. 1, 109 Pac. 197, in which we have this day affirmed the judgment of the trial court. Fred Blumberg, now deceased, was first elected auditor of Skagit county in 1902, and reelected in 1904, his second term expiring in January, 1907. This action was commenced against Allen Blumberg, administratrix of his estate, and American Bonding Company, a corporation, as surety, on his official bond given in the penal sum of $10,000, to recover for his embezzlements and defalcations, alleged to have occurred during his second term. No question of the statute of limitations is here involved. The items claimed in the complaint and now disputed may be summarized as follows:

Balance due on Fee Book	$140.70
Hunters Licenses	4.00
Marriage Licenses	36.00
Fees to be paid to the clerk of the court on filing of marriage returns which should have been turned over to successor.	52.00
Liquor Licenses	5,750.00
Warrants on Road Dis. No. 2	215.00
Warrants on Road Dis. No. 3	1,780.00
Warrants on Current Expense Fund	722.10

The cause was tried without a jury, findings of fact, to which no exceptions have been taken by either party, were made and entered, and final judgment was entered in favor of the plaintiff for $2,855.93, which includes most of the items above set forth, but excludes the liquor license fees. The plaintiff and the bonding company have both appealed.

As there are two appeals, we will refer to the parties as plaintiff and defendant, and will first consider the appeal prosecuted by the county. The county contends that the trial court erred in refusing any recovery against the defendant bonding company on account of the liquor license fees. The finding on these items was as follows:

"That during the said term of office of the said Fred Blumberg there was paid to the said Blumberg, or to the board of county commissioners of said county, in checks, drafts and money accompanying applications for liquor li-

censes the sum of $6,200. That at the time the applications for such liquor licenses were before the said board of county commissioners to be acted upon, said moneys, checks or drafts were presented to the board of county commissioners either by the applicant for license or by said Blumberg; after the said board had acted upon such applications granting the license applied for, they instructed said Blumberg to turn said moneys, checks and drafts over to the county treasurer; that thereafter the said Blumberg wrongfully and unlawfully converted and appropriated to his own use and failed to account for said moneys, checks and drafts, and the whole thereof, except the sum of $500, which sum of $500 was paid to the state of Washington; that said Blumberg issued to the applicants therefor the liquor licenses directed by the board of county commissioners, knowing that the fees in payment thereof had not been paid to the county treasurer."

Section 6263, Rem. & Bal. Code, which confers on the board of county commissioners exclusive authority to license the sale of intoxicating liquors outside of any incorporated city, town, or village, contains the following proviso:

"Provided, that the annual license fee for the sale of spirituous, fermented, malt, or other intoxicating liquors shall, in no instance, be less than three hundred dollars or more than one thousand dollars, which said license fee shall be paid annually in advance to the county treasurer, who shall pay ten per cent of the amount into the general fund of the state treasury, thirty-five per cent into the county school fund, and the remaining fifty-five per cent into the general county fund."

It will be noticed that this section requires the fee to be paid in advance to the county treasurer, but that no procedure is fixed by the statute itself for carrying this mandate into effect. If the fees were actually paid to the treasurer before the application for a license was granted, a strict construction of the statute—not more strict than that contended for by the defendant bonding company—would require prompt payment of ten per cent to the state treasurer. Should the application thereafter be refused, complications might arise, and under our holding in *Hemrich Brothers*

Brewing Co. v. Kitsap County, 45 Wash. 454, 88 Pac. 838, the money could only be disbursed by the treasurer on proper orders made, and warrants issued. Common business prudence would demand that actual payment should not be made to the treasurer until the license was ordered to be issued by the commissioners. But by whom should it be then paid to the treasurer? Undoubtedly by the auditor, with whom the fee was deposited with the application when made. After the commissioners had actually passed upon and granted the application, it would then become the duty of the auditor, as *ex officio* clerk of the board of county commissioners, to issue the license, first seeing to it that the deposit made with him by the applicant was then paid in advance to the county treasurer. It is evident that the fees mentioned in the finding were paid to Blumberg by the several applicants, and that Blumberg converted the same to his own use.

The defendant bonding company contended, and the trial court held, that the applicants were required by the statute quoted to themselves pay the license fee directly to the county treasurer; that the auditor had no authority to receive it; that payment to him was in violation of the statute; that he simply became the agent of the applicants when he collected the fees; that he did not act as county auditor; that he was not guilty of embezzlement in converting the money to his own use; and that the defendant bonding company is not liable as surety for the loss of such fees. This contention cannot be upheld. The statute does not explicitly provide that the fee should be paid to the county treasurer *by the applicant*, so as to exclude the idea that it might first be deposited with the county auditor by whom it would afterwards be paid to the treasurer in advance, when the license was granted. If the contention of the bonding company is well founded, it would necessarily follow that no legal payments have yet been made by the applicants to whom the licenses were issued, and that the county would have causes of action against them. But were suits for the fees to be in-

stituted against them by the county, the applicants could undoubtedly avoid recovery, on the authority of *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, recently decided by this court. The record shows that these license fees were paid by fifteen different applicants, and that a regular custom was followed in transacting the business. The county commissioners in each instance knew the money was in Blumberg's possession. They directed him to issue the licenses and to pay the fees to the treasurer. He issued the licenses, but unlawfully converted the fees to his own use. Subdivision 9, § 3917, Rem. & Bal. Code, directs that the county auditor shall, as clerk of the board of county commissioners, "perform all other duties required by law or any rule or order of the board." It was his duty under their orders to issue the licenses, and also to pay the fees to the county treasurer. It was not his duty to issue the licenses and embezzle the fees. The bonding company guaranteed the faithful performance of all acts of Blumberg in connection with his office and its duties. This guaranty means something. No embezzlement, misappropriation of funds, or other dishonest act, was any part of the duty of the county auditor. Faithful discharge of official duty contemplates not only the performance of those positive duties required by the statute, but also that the official will refrain from doing any fraudulent acts in connection with his office which he could not accomplish if he were not in official position.

Blumberg as county auditor was only charged with the duty of issuing liquor licenses, when all the prerequisite conditions had been performed. As auditor he was *ex officio* clerk of the board of county commissioners. It was his duty to keep proper records, minutes, and proceedings, and to know the exact status of all matters pending before them. When he issued a liquor license, knowing that he had not obeyed their orders by paying the money to the county treasurer, he knowingly committed a fraudulent act in direct violation of his duties as auditor, and the bonding company

should now respond for the losses which the county sustained.

The correct rule to be applied to the facts before us is well stated in the first syllabus of *Hall v. Tierney*, 89 Minn. 407, 95 N. W. 219, in the following language:

"The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it."

In *State v. Leach*, 60 Me. 58, the defendant, as register of deeds for Cumberland county, falsely and fraudulently made, issued, and delivered an official certificate to the effect that he had examined the records of his office affecting title of one Leavitt to a certain lot, and that he found no incumbrances thereon. It was no part of his official duty to make such examinations, or give certificates of title, yet in a criminal prosecution predicated upon the acts mentioned, he was held guilty of misconduct in office. In *Board of Com'rs of Ramsey County v. Sullivan*, 89 Minn. 68, 93 N. W. 1056, sureties on the bond of a county auditor were held liable for the act of his deputy, in fraudulently issuing fictitious redemption and refunding orders for the purpose of obtaining money from the county treasurer. The court said:

"The duty of issuing valid redemption and refunding orders in proper cases was imposed by law upon the auditor. The deputy took advantage of the opportunity afforded by reason of his office, and issued fraudulent instead of valid orders. Such act was in the line of his duty and was what is termed in the books '*virtute officii*' or '*colore officii*,' and under the great weight of authorities the sureties are liable for such acts."

If Blumberg had not been auditor he could not have obtained possession of the liquor license fees, nor could he have issued the licenses. Without issuing the licenses he could not have misappropriated the money. The county sustained loss by reason of his malfeasance, dishonesty, and corrupt use of

the opportunities afforded by his position as auditor. The undertaking executed by the bonding company guaranteed faithful and diligent performance of the duties of his office according to law, and payment to the proper officer of all moneys that might come into his hands. He did neither, and the defendant is liable for the resulting financial loss sustained by the county. The trial court erred in holding that the plaintiff was not entitled to recover for the liquor license fees embezzled by Blumberg, but should have allowed plaintiff $5,700, which was the amount he received, after deducting his payment of $500 to the state.

Most of the questions raised by the defendant bonding company on its cross-appeal are disposed of in the opinion this day filed in *Skagit County v. American Bonding Co., supra*, and also by the foregoing discussion, as they involved warrants fraudulently issued, warrants raised in amounts, and fees collected by Blumberg and not paid to the county.

The trial judge made, with others, the following finding:

"I further find that during his term of office the said Fred Blumberg received for the county clerk $41 for as many marriage license recording fees, which it was his duty to pay over to the county clerk as his fee for recording the marriage license returns. I find that the said fees were paid to the said Blumberg on the dates set out in paragraph 10 of plaintiffs' complaint, but that the evidence does not show when the money was misappropriated by the said Blumberg, but did show that the same had been received by him, and not accounted for, but was converted to his own use."

Upon this finding the plaintiff was awarded the sum of $41, included in the final judgment. The defendant company first contends that there was no law authorizing or permitting Blumberg to receive these recording fees, and that his misconduct with reference thereto was not a breach of the terms of his bond. As he received the money by reason of his position as auditor, and could not have received them otherwise, this contention cannot be sustained.

The company further contends that only a portion of these

fees was received during Blumberg's second term, and that it is not liable upon the bond involved in this action for that portion of the fees received during his first term. Blumberg's failure to account for fees received during his first term created a liability on the bond given for that term. As shown by paragraph 10 of the complaint, to which the finding refers, $19 only of these fees was received by Blumberg during his second term. Forty-one dollars was allowed. The defendant company is therefore entitled to a reduction of $22 on this account.

On the entire record we conclude that the judgment awarded by the trial court should be increased in the sum of $5,700 for liquor licenses collected, and decreased in the sum of $22 on account of fees for recording marriage certificates. The judgment will, therefore, be reversed, and the cause remanded with instructions to enter judgment in favor of plaintiff in accordance with this opinion. Neither party will recover its costs on this appeal.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8713. Department Two. June 11, 1910.]

C. R. WHITLOCK, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*.[1]

CARRIERS—PASSENGERS—EJECTION FROM DEPOT—ASSAULT BY OFFICER—LIABILITY OF CARRIER. A deputy sheriff who was called by a railway station agent to assist in ejecting undesirable trespassers who were occupying seats in the depot, acts as agent of the railway company and within the scope of his authority, when he wrongfully assaults a passenger in attempting to eject persons from the depot, at the agent's request, and the company is liable for the damages inflicted.

SAME—NEGLIGENCE OF CARRIER—ASSAULT ON PASSENGER—EVIDENCE—SUFFICIENCY. It is negligence for a railway station agent, who called a deputy sheriff to assist in ejecting undesirable trespassers

[1]Reported in 109 Pac. 188

from the depot, to fail to notify the officer who the passengers were, when this could have been easily done; and in such case proof of an assault upon a passenger by the officer makes out a *prima facie* case for damages against the railway company.

SAME—PASSENGERS—EJECTION FROM DEPOT—DEGREE OF CARE—INSTRUCTIONS. In an action by a passenger, waiting in the depot for his train after purchasing a ticket, for an assault by an officer called by the agent to eject trespassers from the depot, it is correct to instruct that the railway company owes the highest degree of care that an ordinarily prudent man would give for the protection of such passengers as against its own machinery, appliances, operation and conduct of its employees; and the use of the word "machinery" is not prejudicial as interjecting a new element in the case, where the issue was clearly defined, the jury could not have been misled, and were instructed that plaintiff could not recover if the company used reasonable care to prevent the assault.

CARRIERS—PASSENGERS—WHO ARE. A person who had purchased a railway ticket and was waiting in the depot for his train is a passenger.

DAMAGES—PERSONAL INJURIES—ASSAULT—EXCESSIVE VERDICT. A verdict for $1,000 for an assault upon a passenger in ejecting him from a depot is excessive and should be reduced to $500, where he suffered for only about thirty-six hours from a blow on the neck, and no further attempt was made to eject him upon the agent's calling attention to the mistake of the officer in attempting to do so.

Appeal from a judgment of the superior court for King county, Gay, J., entered October 1, 1909, upon the verdict of a jury rendered in favor of the plaintiff for $1,000 damages for an assault upon a passenger. Reversed, unless $500 is remitted.

I. B. Knickerbocker, for appellant Roehl.

Carroll B. Graves and *Charles H. Winders*, for appellant Railway Company, contended, among other things, that the relation of master and servant did not exist between the officer and the company. *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Tolchester Beach Imp. Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846; *Brunswick & W. R. Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430, 97 Am. St. 152, 60 L. R. A. 713; *Sinclair v. Baltimore*, 59 Md. 592; *Kehoe v.*

Marshall Field & Co., 141 Ill. App. 140,; Id., 237 Ill. 470, 86 N. E. 1054. The officer's assault was not within the scope of his employment. *Penny v. New York Central etc. R. Co.*, 53 N. Y. Supp. 1043; *Cunningham v. Seattle Elec. Co.*, 3 Wash. 471, 28 Pac. 745; *Thorburn v. Smith*, 10 Wash. 479, 39 Pac. 124; *Chase v. Knabel*, 46 Wash. 484, 90 Pac. 642, 12 L. R. A. (N. S.) 1155; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216; *Mills v. Seattle, Renton & Southern R. Co.*, 50 Wash. 20, 96 Pac. 520; 2 Hutchinson, Carriers (3d ed.), p. 1283. It was error to instruct that the company owed the highest degree of care in the maintenance of its station and the protection of its passengers. 6 Cyc. 605; 5 Am. & Eng. Ency. Law (2d ed.), p. 532; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. 127, 97 Am. St. 519, 60 L. R. A. 601; *Crowe v. Michigan Cent. R. Co.*, 142 Mich. 692, 106 N. W. 395; *Hiatt v. Des Moines N. & W. R. Co.*, 96 Iowa 169, 64 N. W. 766; *Georgia etc. R. Co. v. Brown*, 120 Ga. 380, 47 S. E. 942; *Tate v. Illinois Cent. R. Co.* 26 Ky. Law 309, 341, 81 S. W. 256; *Flenn v. Lake Erie & W. R. Co.* (Ind. App.), 73 N. E. 861; *Laffin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433; *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252; *St. Louis etc. R. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. 74; *Batton v. Southern & N. A. R. Co.*, 77 Ala. 591, 54 Am. Rep. 80; *Brown v. Chicago R. I. & P. R. Co.*, 139 Fed. 972, 2 L. R. A. (N. S.) 105; *Houston & Texas Cent. R. Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392; *Trinity & S. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389; *Moreland v. Boston & P. R. Co.*, 141 Mass. 31, 6 N. E. 225; *Falls v. San Francisco & N. P. R. Co.*, 97 Cal. 114, 31 Pac. 901.

Holzheimer, Herald & Holzheimer, for respondent, cited: *Fremont E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 4 L. R. A. (N. S.) 254; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *Grand*

Rapids & I. R. Co. v. Martin, 41 Mich. 667, 3 N. W. 173; *Knight v. Portland etc. R. Co.*, 56 Me. 234, 96 Am. Dec. 449; *Warren v. Fitchburg R. Co.*, 8 Allen 227, 85 Am. Dec. 700; *Webster v. Fitchburg etc. R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Dodge v. Boston & B. S. Co.*, 148 Mass. 207, 19 N. E. 373, 12 Am. St. 541, 2 L. R. A. 83; *Weston v. New York Elev. R. Co.*, 73 N. Y. 595; *Norfolk & W. R. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935; *Burke v. Chicago & N. W. R. Co.*, 108 Ill. App. 565; *Crantz v. Rio Grande Western R. Co.*, 12 Utah 104, 41 Pac. 717, 30 L. R. A. 297; *Johns v. Charlotte etc. R. Co.*, 39 S. C. 162, 39 Am. St. 709, 20 L. R. A. 520; *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608; *Clussman v. Long Island R. Co.*, 73 N. Y. 606; *Dice v. Willamette T. & L. Co.*, 8 Ore. 60, 34 Am. Rep. 575; *McElroy v. Nashua etc. R. Co.*, 4 Cush. 400, 50 Am. Dec. 794; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304, 2 Am. Rep. 229; *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Pittsburg etc. R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

MOUNT, J.—The respondent recovered a judgment against the appellants for $1,000, on account of an assault committed upon him by the appellant Roehl. The plaintiff alleged, that the defendant Roehl was an agent and servant of the railway company, employed as a watchman at its station at Auburn; that on March 21, 1909, plaintiff purchased a ticket at that station, entitling him to transportation from Auburn to Covington Station; that after purchasing such ticket, and while peacefully awaiting the arrival of the train, the defendant Roehl wrongfully endeavored to eject him from the station and violently assaulted plaintiff and inflicted severe injuries upon him. At the close of plaintiff's evidence, the defendants moved the court for a nonsuit, which motion was denied.

It is argued here that the facts were not sufficient to support a verdict for the plaintiff. It appears that Auburn Station is a junction point on the main line of the Northern Pacific railway, that all trains passing from the east and west transfer at this point, and that many disreputable persons congregate in and about this station, and especially on winter nights. The station is outside of the corporate limits of the town. The plaintiff entered the station about eleven o'clock at night, and purchased a ticket for Covington, and was in the waiting room awaiting his train which was due in a few minutes. Mr. Edward James was the agent in charge of the station. During that day a number of persons, who were described as undesirable persons and who were not passengers, had been in and about the station. The night was cold, and these persons had persisted in coming into the station and congregating about the stove. These persons were ordered away from the premises by the agent. It is not shown that the plaintiff was one of these persons, or that he knew that any of them had been ordered away.

About eleven o'clock at night the agent by telephone called Mr. Roehl, who was town marshal of Auburn and a deputy sheriff of the county of King, to come to the station. Mr. Roehl, in response to this call, came to the station, and was informed by the agent that there were a number of undesirable persons in the waiting room who had not purchased tickets and who did not intend to do so, and that he desired such persons ejected. The agent also informed Mr. Roehl that several persons there held tickets. Mr. Roehl then told Mr. James to go into the waiting room and notify all persons who did not have tickets, and who did not intend to purchase tickets, to leave. The agent then, followed by Mr. Roehl, went from his office to the waiting room, and quietly requested one or two persons to leave. At the same time Mr. Roehl began to push several persons from the room, among whom was the plaintiff. Mr. Roehl struck the plaintiff a blow on the neck with his hand or fist. About this time Mr.

James, the agent, saw what Mr. Roehl was doing, and told him that the plaintiff had purchased a ticket. Mr. Roehl then made no further effort to eject the plaintiff.

It is argued by the appellant railway company, in substance, that Mr. Roehl was not the agent of the company, and was acting in his capacity as a peace officer; and that, if he was the agent of the company, he acted wholly outside of the scope of his authority when he assaulted the plaintiff. We think both of these contentions are untenable. Mr. James was the regularly employed agent of the company and had charge of the station. He called Mr. Roehl to his assistance in order to eject some persons from the building. Mr. Roehl was a peace officer in that vicinity, but upon this occasion he acted at the request of Mr. James. He was assisting the agent, and the company was bound by his acts as the acts of the agent. There is no claim that any of the persons in the station were misbehaving, or were rude or offensive in any way in the presence of Mr. Roehl, except that they were occupying seats within the station in order to keep warm. Under these circumstances it was the duty of the agent to know, and to inform Mr. Roehl, who the passengers were in the station, and who were entitled to remain. If the agent had personally committed the assault, the company would clearly be liable. The fact that it was committed by one who was called in by the agent would not relieve the company, unless such person acted wantonly without the scope of his authority. It is true the agent had told Mr. Roehl that he would notify those to leave who were not entitled to remain, and that while he was doing so Mr. Roehl assumed that the plaintiff had been, or would be, notified, and assaulted him. Up to this time the plaintiff did not know what the agent or Mr. Roehl desired. The plaintiff being a passenger was entitled to protection, and when it was shown that he was assaulted by one acting at the request of an agent of the company, this clearly made a *prima facie* case to go to the jury, for it was the duty of the agent to notify the

person called to his assistance who the passengers were before permitting him to make an assault, and such failure was at least negligence. The record does not show the exact number of passengers in the room, but it shows there were not many, probably not to exceed five or six; so that it would have been a simple matter to have pointed them out to Mr. Roehl. In this way the assault upon the plaintiff would have been avoided. There was no error, therefore, in submitting the case to the jury.

In the course of the instructions to the jury the court said:

"I charge you that a person that goes within one of the depots of a railroad company and there purchases a ticket and is compelled to wait until the coming of a train to transport him from that depot provided by the defendant company, that he at once becomes a passenger and that it is the duty of the company then to use as against its own machinery and its own employees toward him the highest degree of care for his protection and safeguarding."

After the jury had retired, the court recalled the jurors, and said to them:

"My attention has been called to my phraseology in my instruction given to you respecting the duty of the railroad company to exercise toward its passengers the highest degree of care. That was given to you without any qualifying words. You are to understand by the terms 'highest degree of care' that it means the highest degree of care compatible with the safe and reasonable conduct of its business. The railroad company is not an insurer to any passenger that they will not be assaulted; that they will not have accidents; but the law does hold them to the exercise as against its own machinery and appliances, its cars and the operation of its road and the conduct of its employees, to the exercise of the highest degree of care compatible with the conduct—the ordinary conduct and course of its business that a reasonably prudent man would give."

It is argued by the appellant that this instruction is erroneous, because it injects into the case the question of care in regard to the use of machinery and appliances, when there

was no such issue in the case; and also because the degree of care in regard to passengers waiting at a station is ordinary care and not the highest degree, as is required in the use of machinery and appliances and the operation of trains. There was no necessity for the court to make any reference to machinery or appliances, for there was no issue in regard thereto. But it is plain that no prejudicial error can be based thereon, for the issue was clear and well understood by the jury that the want of care complained of was on the part of the agent of the company. There was no other contention. The reference by the court to machinery and appliances did not, and was not intended to, inject any other issue into the case. The instruction under consideration, in substance, charges that it was the duty of the appellant to use the highest degree of care for the protection of its passengers against the conduct of its employees, and that the highest degree of care meant the highest degree of care "that an ordinarily prudent man would give" in the ordinary conduct of his business. In other parts of the instructions the court, in a number of instances, told the jury, in substance, that the plaintiff could not recover if the railway company used reasonable care to prevent the assault, and such like expressions.

But, assuming that the court meant to instruct the jury by this instruction that the railway company was bound to use the highest degree of care to prevent the assault, we think the instruction was not error. The rule is stated in 6 Cyc., page 600, as follows:

"The duty of the carrier to protect the passenger must be discharged by means of his servants engaged in carrying out the transportation contracted for. Therefore if any servant of the carrier while thus engaged assaults a passenger or otherwise infringes the right of protection to which he is entitled, the carrier is liable irrespective of whether the servant in the thing done was acting for his master or for his own purposes. . . . So long as the passenger is being transported, or is on the carrier's premises legitimately in connection with such transportation, and the servant is there

employed about the business of the carrier in his relation to the passenger, the duty of protection exists."

It is conceded in this case that the respondent had purchased his ticket, and was rightfully in the waiting room, and was orderly. He was, therefore, a passenger, entitled to protection as such. If Mr. James, the agent in charge of the station, had made the assault himself, there could be no question of care in the case, and no doubt about respondent's right to recover. The fact that Mr. James called Mr. Roehl to his assistance in removing persons who were not passengers, did not relieve the appellant of the positive duty to protect the passenger from assault by its employees. Mr. James was required, therefore, not only to notify Mr. Roehl who the passengers were, but to prevent his assault upon the passengers. Mr. Roehl, for the purpose of clearing the waiting room in question, was acting in the place of the agent. He was not a third party for whose acts the company was bound to use only ordinary care to prevent injury, as in the cases cited in the appellants' brief. The cases do not appear to be in harmony upon the question of the degree of care owing by a carrier to a passenger, in regard to the safety of its stations and facilities. Some of the cases hold that ordinary care only is required, while others hold that the highest degree of care is necessary. The case of *Fremont etc. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254, a case decided in the state of Nebraska, cites many of the cases upon that question, but we are of the opinion that, under the conceded facts in this case, if the question of care is to be considered at all, the agent of the company was bound by the highest degree of care, and the instruction was not error.

We are satisfied, however, that the verdict was excessive. No serious personal injury was inflicted upon the respondent. He suffered pain for about thirty-six hours, and also some inconvenience for about thirty days. But he suffered no pecuniary loss or loss of time. After the agent discovered

that Mr. Roehl had struck the respondent, he called attention to the fact that a mistake had been made, and no further effort was made to eject respondent from the station, or to further assault him. It is apparent that $500 would be ample compensation for the injury.

The questions presented by the appeal of Mr. Roehl are the same as the ones above considered and need not be considered further. The judgment appealed from is reversed, and the cause remanded with directions to grant a new trial unless the respondent, within thirty days after the remittitur is filed in the lower court, shall remit $500 from the verdict, in which event the judgment will stand affirmed for $500. Appellants to recover the costs of this appeal.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8532. Department One. June 13, 1910.]

M. YATSUYANAGI *et al.*, *Appellants*, v. S. SHIMAMURA, *Respondent*.[1]

PARTNERSHIP—EXISTENCE OF RELATION—ARTICLES—SUFFICIENCY. Written articles of copartnership are sufficient to establish a partnership where it can be determined from the express agreement, or inferred from their acts and conduct, that the parties intended to establish a partnership relation, notwithstanding that certain blanks as to deposits in a bank and division of surplus were not filled up, and a separate agreement relating to their several contributions to the partnership property referred to in the articles was never executed, the blanks being immaterial details, and the law assuming the contributions to be equal in the absence of agreement to the contrary.

DAMAGES—LIQUIDATED DAMAGES—BREACH OF PARTNERSHIP AGREEMENT. Liquidated damages may be awarded for the breach of articles of copartnership for conducting a tailoring business for the period of five years, where the articles provided that any member withdrawing therefrom without the consent of his copartners shall pay the sum of $1,000 as liquidated damages, no fraud or illegality appearing; since the ascertainment of damages would be difficult and uncertain.

[1]Reported in 109 Pac. 282.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 7, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for the dissolution of a partnership, and for damages. Reversed.

Fred Wayne Catlett and *P. V. Davis*, for appellants.

Solon T. Williams, for respondent.

Morris, J.—In this action the appellants sought to recover of respondent $1,000, as liquidated damages for the breach of a partnership agreement. The defense was a denial of the partnership relation. Upon the trial the court below found that the agreement relied upon by the appellants to establish the partner relation had been duly executed by all the parties; that in celebration of their new relation the parties joined in giving a dinner, at which they and their respective employees were present; that respondent assisted in preparing the location decided upon for the carrying on of the business; that he was present at such place nearly every day from July 4 to July 27; that he took some part in the discussion of affairs pertaining to the business, sold a suit of clothes, and measured some cloth; that cards advertising the business were issued with his knowledge and consent, upon which his name appeared as one of the proprietors of the business; that in August or September he refused to recognize himself as a partner, and finally refused to have anything more to do with the business. The court then found, as a conclusion of law, that the articles of copartnership were too indefinite to constitute a partnership, and dismissed the action, from which judgment this appeal is taken.

It is apparent that the first question to be determined is, was there a legal and binding partnership between the parties; for it is likewise apparent that, if in law the parties ever assumed such a relation, the facts as found by the court, and which are sustained by the evidence, would be a sufficient recognition of such a relationship, and its breach on the part of

respondent. The instrument upon which appellants rely to sustain their contention is as follows:

"ARTICLES OF CO-PARTNERSHIP.

"This agreement of co-partnership, made and executed in quadruplicate this 30th day of June, A. D. 1908, by and between M. Yatsuyanagi, A. Takatsu, N. Fukuda and S. Shimamura:

"Witnesseth: That said parties hereby associate themselves together as copartners under the name and style of Nippon United Tailoring Company under the following terms and conditions:

"1st. This copartnership shall exist for the period of five years from this date, unless previously dissolved by mutual consent of all parties, and for such further time as may then be agreed upon by all of such parties, and in the event that one or more of said parties shall withdraw from said copartnership without the consent of all of his associates herein he shall forfeit and pay to the remaining member or members the sum of one thousand ($1,000) dollars cash, as for liquidated damages for such withdrawal, and the said sum shall be the property of the party or parties refusing to give his or their consent to such withdrawal.

"2nd. Each of said parties shall give his best work and endeavor and his best influence towards furthering the objects for which this copartnership is formed.

"3rd. The object for which this copartnership is formed is to carry on a tailoring business in the city of Seattle, Washington.

"4th. The sum of four thousand ($4,000) dollars is the capital stock of said copartnership, and to the making up of said capital stock each of said parties contributes his location and good-will and it is the intention and desire of said parties that the same shall be owned in equal shares among the said parties, but inasmuch as their stocks and goods are not at present exactly equal they have this day entered into a separate agreement among themselves, which is made a part hereof, whereby they have determined the exact amount contributed by each, and until the said amounts so as aforesaid contributed have been adjusted according to said last mentioned agreement, the parties hereto are to receive their dividends on the profit of this copartnership in proportion to the

amounts by them respectively put in as shown by the said agreement herein referred to.

"5th. Each of said parties shall be employed by and work for said copartnership from the hour of eight a. m. to eight p. m. (Sundays excepted) except on Saturday, when the hours shall be from eight a. m. to ten p. m. with one hour each day for dinner and for such times as any party shall be absent, except on account of sickness, a corresponding deduction shall be made from his wages hereinafter mentioned, and in the case of sickness a doctor's certificate must be furnished. Each of said parties shall receive as wages for the work in this paragraph mentioned, the sum of ——— dollars per week, and none of said parties shall draw any money from the said copartnership except his said weekly wages, which shall be paid on Monday of each week for the preceding week, and on no other day.

"6th. All money received by said copartnership shall be deposited in the name of the copartnership in the ——— bank, and no money shall be paid out on account of said copartnership except by check.

"7th. When there shall be on hand the sum of ——— dollars, over and above the amount necessary for current expenses, and when the copartnership shall be free of debt, the said surplus shall be divided as provided for in paragraph 4 hereof.

"8th. No money of said copartnership nor any credit of the same shall ever be used for the private purposes of either of said parties, and each of said parties hereby binds himself to pay his own debts, so that the said copartnership shall in no way become responsible therefor.

"9th. Each of said parties hereby binds himself not to engage in any business similar to the business of this copartnership nor to become interested in any manner, either financially or otherwise, in any such business during the said term of the continuance of this copartnership, and each of said parties hereby agrees that should he violate the terms of this paragraph, any and all interest he may have in the said copartnership shall be forfeited to and become the property of the other member or members thereof, as and for liquidated damages.

"10th. It is further agreed and understood as a part of this agreement of copartnership that no slang language or profane or indecent language shall be used, nor any boister-

ous conduct indulged in, or permitted in, on or about the premises where the business of this copartnership is conducted.

"In witness whereof, we have hereunto set our hands and seals in quadruplicate the day and year in this agreement first above written.

	"M. Yatsuyanagi	(Seal)
"Witnesses:	A. Takatsu	(Seal)
"Solon T. Williams	N. Fukuda	(Seal)
"H. K. Fukumoto.	S. Shimamura	(Seal)"

We fail to see in what essential particulars this instrument is lacking to establish a partnership between the parties. As we understand the law, the essential test in determining the partnership relation, is whether the parties intended to establish such a relation; and that, as between themselves, this intention is to be determined by their express agreement, or inferred from their acts and conduct. *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225. It appears that the agreement referred to in paragraph 4 was never executed, nor were the blanks in paragraphs 5, 6, and 7 ever filled in; but such failure in no wise detracts from nor lessens the binding effect of the written agreement executed by the parties; neither of these provisions being in any sense essential to the forming or existence of the relation. In the absence of any agreement to the contrary, the law would assume that the several contributions to the partnership property were equal, and that there was an equal division of the profits and losses. The depositing of the funds in any particular bank or other place was a nonessential. So was the time when there was to be a division of the surplus. These were mere details that in no way contributed to, nor entered into, the creation of the relation itself.

On September 28 the appellants formally dissolved the partnership, and a few days later brought this action. No question is raised here as to whether this is a proper case for awarding liquidated damages, but inasmuch as we must decide that question in order to determine the character of our judgment, we have considered it as properly before us.

The nature of the business was such that, upon a breach of the contract, the ascertainment of damages would be difficult and uncertain, and it would require exceedingly nice discernment and clear distinction on the part of either court or jury to keep away from the realm of speculation and remoteness. There is nothing in the record before us to show any fraud, circumvention, or illegality, which are potent factors in determining whether a sum determined upon by the parties to a contract as liquidated damages will be enforced as such by the courts. Neither is there anything to show that such sum is disproportionate to the actual loss, another feature much regarded by the courts in determining the question.

We therefore hold that this is a proper case for awarding liquidated damages, and as there can be no question raised, in view of this decision, as to the binding force of the partnership agreement, nor its breach by respondent, it only remains to reverse the judgment of the court below and remand the case with instructions to enter a judgment in favor of appellants and against respondent in the sum of $1,000, and costs of both courts. It is so ordered.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 8806. Department Two. June 13, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. W. J. DANA, *Appellant*.[1]

FALSE PRETENSES—EVIDENCE—ADMISSIBILITY. In a prosecution for obtaining money by false pretenses, in that the defendants D. and H. represented that they owned a lot of the value of $250, and pointed out another more valuable lot as the lot in question, and procured the money upon H.'s deed of the lot to the prosecuting witness, it is admissible for the state to introduce in evidence a deed of the same lot from H. to D. antedating H's deed to the prosecuting witness, for the purpose of showing intent to defraud and that H. had no title at the time of the conveyance to the prosecuting witness.

DEEDS—DATE OF EXECUTION—PRESUMPTION. A deed is presumptively executed and delivered on the date of its execution and acknowledgment.

CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—ADMISSIBILITY. Evidence relevant to the issues of a cause is not inadmissible because it tends to show the commission of a crime other than the one charged.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 31, 1908, upon a trial and conviction of the crime of obtaining money under false pretenses. Affirmed.

Philip Tworoger, for appellant.

George F. Vanderveer and *John H. Perry*, for respondent.

RUDKIN, C. J.—This was a prosecution for the crime of obtaining money by false pretenses. The representations or pretenses set forth in the information were three in number: viz., that the defendants were the owners of a certain lot, described as lot 1 of block 84 of McNaught's addition, to Central Seattle; that the lot was of the value of $250, and that a certain lot situated near the intersection of Walker street and 23d avenue in that city was pointed out to the prosecuting witness by the defendant Dana as and for the

[1]Reported in 109 Pac. 191.

lot in question. The information charged the falsity of the representations or pretenses thus made, in the following language:

"Whereas, in truth and in fact, said W. J. Dana, Eric Hostland and Lena Vosberg, or any of them did not own said lot one (1); that certain lot or piece of property then and there situated on Walker street near Twenty-third avenue in said city of Seattle, which said W. J. Dana then and there pointed out and showed to said Theodore Myers as aforesaid was not then and there that certain lot or piece of property known and described as lot one (1) in block eighty-four (84) of McNaught's addition to Central Seattle, in said city of Seattle; and the lot or piece of property known and described as said lot one (1) was not then and there of the value of two hundred and fifty dollars in lawful money of the United States—all of which they, said W. J. Dana, Eric Hostland and Lena Vosberg then and there well knew."

The testimony introduced at the trial tended to show the following facts: The defendant Dana solicited a ninety-day loan of $200 from the prosecuting witness and agreed to convey the lot above described as security for the loan, coupled with an agreement on the part of the prosecuting witness that he would reconvey the property to the defendants, upon repayment of the loan, together with a bonus of $50. The defendant Dana and the prosecuting witness visited the auditor's office and made a cursory examination of the records to determine the state or condition of the title, and then went out and viewed the lot. Dana pointed out a certain lot to the prosecuting witness on Walker street near 23d avenue, assuring him that it was the lot in question, and the loan was agreed upon. Thereafter lot 1 of block 84, above described, was conveyed to the prosecuting witness by the defendant Hostland, in whose name it was claimed the title stood for convenience, and the $200 was paid over to the defendant Dana as agreed. Later, the prosecuting witness discovered that the lot conveyed was situated several blocks from the lot pointed out to him by Dana, and was of

comparatively little value compared with the other lot. This prosecution followed, and a separate trial of the defendant Dana resulted in his conviction, from which this appeal is prosecuted.

Upon the trial of the action, the state offered in evidence the record of a deed from the defendant Hostland to the appellant Dana for the same lot, which antedated by several days the deed to the prosecuting witness. The admission of this record is the only error discussed in the appellant's brief, his contention being that the deed was irrelevant to the issues on trial, and tended to show the commission of another and different crime. The information in the case was drawn very loosely, and with little regard to the actual facts disclosed by the state's testimony. There was an apparent attempt to charge that the defendants below had no title to the lot actually conveyed, but the information was clearly defective and insufficient in this respect. However, it does not follow from this that the testimony complained of was not relevant to the issues. It was incumbent on the state to prove not only the obtaining of the money by false pretenses, but also an intent to defraud, and it seems to us that no more cogent proof of this intent could be offered than a showing that, at the time of the conveyance, the grantor of the prosecuting witness had no title to either the lot conveyed or the lot pointed out, and that this fact was well known to the appellant. The deed from Hostland to the appellant was presumptively executed and delivered on the date of its execution and acknowledgment (Devlin on Deeds (2d ed.), §§ 178, 182, 265), and if so, no title passed by the deed to the prosecuting witness. It may be said that the latter's title would prevail over the earlier deed because of fraud and because his deed was first recorded, but this would not destroy the force or effect of the testimony as a circumstance tending to show fraudulent intent. Of course, if the offered testimony was relevant to the issues in this case, the fact that it tended to show the commission of another and

different crime would not exclude it. Greenleaf, Evidence, § 53; Wharton, Criminal Evidence, § 31 *et seq.*

We find no error in the record, and the judgment is therefore affirmed.

CROW, PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8673. Department Two. June 14, 1910.]

JOHN LUPER, *Respondent*, v. H. C. HENRY, *Appellant*.[1]

EVIDENCE—OPINIONS—SAFE CONSTRUCTION. Upon an issue as to negligence in the construction of a platform, experts may be permitted to answer a hypothetical question as to whether it was properly constructed.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. It is harmless error to allow experts to state whether a platform was properly constructed and give opinions as to the cause of its falling, where reasonable minds could not differ and their conclusions were so self-evident that no prejudice could result.

MASTER AND SERVANT—NEGLIGENCE—CONSTRUCTION OF PLATFORM. There is sufficient evidence of negligence in the construction of a platform supporting a donkey engine, which fell upon employees, where it appeared that the foundation was weak and wavering and the platform toppled over several degrees allowing the engine to fall to the ground.

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—INSTRUCTIONS. In an action for injuries sustained by an employee through the fall of a negligently constructed platform, it is not error to refuse in instruct that the plaintiff could not recover if his injuries were caused by the negligence of a co-employee, a certain engineer, where the latter was in no way responsible for the accident, and the jury were properly instructed as to nonliability for the acts of fellow servants.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,800 for injuries sustained by a common laborer 26 years of age is not excessive, where his spine was injured, probably permanently, and he had been unable to perform manual labor for nine months at the time of the trial.

[1]Reported in 109 Pac. 208.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 23, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee upon railroad construction work. Affirmed.

Roberts, Battle, Hulbert & Tennant, for appellant.
Jay C. Allen, for respondent.

RUDKIN, C. J.—This was an action to recover damages for personal injuries. At the time of the accident complained of, the plaintiff was in the employ of the defendant, who was engaged in the construction of a section of the Chicago, Milwaukee & St. Paul railroad near the town of Cle Elum, in Kittitas county. At the place of the accident the railroad was built on a trestle about twenty feet above the ground, and a platform of the same height was constructed alongside the railroad, on which was stationed a donkey engine employed in hoisting gravel and cement used in concrete work. A cable extended from the drum of the engine over a pulley at the top of an elevator, situated some distance from the engine, and was attached to a wooden box or bucket in which the cement and gravel were dumped from wheelbarrows and hoisted to the mixer, about 25 feet above. The gravel was dumped from trains on the trestle to the ground underneath, in close proximity to the elevator, near the foot of the platform on which the engine was stationed. The plaintiff and his fellow workmen, to the number of six, were engaged in wheeling gravel from the dump to the elevator at the time of the accident. After they had been thus engaged for about two hours, and while the plaintiff was filling his wheelbarrow near the foot of the platform, the platform gave way, or the engine was pulled from the platform by the cable attached to the bucket in the elevator, and some part of the engine, or some of the materials out of which the platform was constructed, fell upon the plaintiff, causing the injuries for which a recovery is here sought. The complaint charged

that the platform on which the donkey engine was stationed was unsafe and insecure, and that the engine was old, worn, and out of repair, so that it would get beyond the control of the engineer and run away. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant has appealed.

After the respondent had offered testimony tending to show the manner in which the platform was constructed, and the manner in which it toppled over and collapsed, causing the injury, he called two experts and propounded a hypothetical question calling for their opinion as to the safety of the platform and the cause of the accident. An objection to the hypothetical question was overruled, and upon this ruling, the first error is assigned. The principal contention of the appellant is that the inference, if any, to be drawn from the facts recited in the hypothetical question was for the jury, and not for the witnesses. The question itself was long and somewhat involved, and we deem it unnecessary to set it forth at length in this opinion. The witnesses were permitted to state that the platform was not properly or safely constructed, and also to express their opinion as to the cause of the accident. The first part of the question was, in our opinion, proper and the latter not; but be that as it may, if the facts were found as stated in the hypothetical question, there is no gainsaying the conclusion that the appellant was guilty of gross and inexcusable negligence in placing his servants at work amid such surroundings. Reasonable minds could not differ upon that question. The answers of the witnesses were so clearly right and their conclusions so self-evident that no injury or prejudice could result from the admission of the testimony. *Curtis v. Barber Asphalt Paving Co.*, 44 Wash. 334, 87 Pac. 345.

It is next contended that the court erred in denying a challenge to the sufficiency of the evidence to warrant a recovery in favor of the respondent. There is no merit in this assignment. The testimony on the part of the respondent tended

strongly to show that the foundation for the platform was weak and wavering, and that at the time of the accident the platform toppled over several degrees, thus permitting the engine and part of the heavy timbers of which the platform was constructed to fall to the ground. Of course there was testimony to the contrary, but we must accept the testimony of the respondent as true on a challenge of this kind.

The appellant requested the court to charge the jury that if they found that the injuries to the respondent, if any he received, were caused by the negligence or carelessness of the engineer in charge of the donkey engine, there could be no recovery, and the refusal of this instruction is assigned as error. Waiving the question whether the respondent and the engineer were fellow servants under the facts disclosed by this record, the latter was in no manner responsible for the condition of the engine or the faulty construction of the platform, and the court charged the jury that the respondent must show "that the engine fell, and the accident was caused, by reason of one of the acts of negligence alleged in the complaint," thus in effect charging that no recovery could be had for the negligence of the engineer. Furthermore, the court defined fellow servants to the jury, and instructed them that the appellant was not liable to the respondent for damages caused by such fellow servants. Other objections were urged against the charge of the court, but they require no discussion. The instructions fully and fairly stated the law of the case and were as favorable to the appellant as the facts would warrant.

It is lastly contended that the verdict is excessive. At the time of the injury the respondent was an able-bodied common laborer, 26 years of age. According to his testimony, his spine was injured, so that he was unable to perform manual labor from the time of the accident to the time of the trial, a period of nine months, and the testimony further shows that his injuries are probably permanent. Under these facts

a recovery of $3,800 is not excessive. Finding no error in the record, the judgment is affirmed.

CROW, PARKER, MOUNT, and DUNBAR, JJ., concur.

[No. 8664. Department Two. June 14, 1910.]

HAROLD OTTOLENGUI, *by His Guardian, Nathan Degginger, Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—STREETS—PRIVATE WAYS—DUTY TO REPAIR—CONTRIBUTORY NEGLIGENCE. The driver of an automobile is guilty of contributory negligence in attempting to travel a road, and the road was not a street which the city was bound to repair, where it appears that the way was constructed over private lands by real estate agents who had put up travel signs for their own purposes, that it was five miles from the business portion of the city, in a wild, rough country, and plainly in very bad condition, and that the city had not opened or authorized the opening of the street.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 15, 1909, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for wrongful death. Affirmed.

Frank E. Green, George H. Bailey, W. H. B. Thomas, and *L. A. Michelson*, for appellant.

Scott Calhoun and *James E. Bradford*, for respondent.

MOUNT, J.—This action was brought on behalf of a minor, to recover damages on account of the death of his mother. At the close of plaintiff's evidence, the trial court directed a verdict in favor of the defendant. The plaintiff has appealed.

It appears that on May 27, 1908, one I. E. Moses invited a party of friends to take a ride in an automobile. The party consisted of six persons besides Mr. Moses, who was driving the automobile, the mother of the minor being one

[1]Reported in 109 Pac. 206.

of the party. They intended to go from the business district of the city of Seattle to Fort Lawton, which is a military reservation situated on the western portion of a tract of land commonly known as Magnolia Bluff. This bluff is surrounded on three sides by Puget Sound. The eastern side is separated from the main part of the city of Seattle by a depression, which is several hundred feet wide and only a few feet above sea level. This depression is known as Interbay, and through it run a number of railway tracks. A bridge extends over this depression, connecting the main portion of the city of Seattle with the Magnolia Bluff district. This bridge is a part of Grand boulevard, one of the public improved streets of Seattle. All of Magnolia Bluff, except the military reservation, is within the corporate limits of the city. To drive to Fort Lawton it was necessary to pass west over Interbay bridge. Immediately after passing this bridge, Twentieth avenue west intersects Grand boulevard at right angles, and runs north and south. The way to Fort Lawton turned north. Mr. Moses was not acquainted with the road.

On the day stated, after passing over the bridge and arriving at Twentieth avenue west, he saw a signboard on a post in the street, which sign contained the following direction: "To Fort Lawton by Scenic Magnolia Drive," with a hand indicating a southerly direction upon Twentieth avenue. Mr. Moses turned southerly along this avenue, and in a short distance came into Thorndyke avenue, running in a southwesterly direction. Following this avenue the party arrived at the intersection of Ray street. There the party found another sign affixed to a pole in the street, reading: "Scenic Magnolia Drive to Fort Lawton by Way of Magnolia Drive, Thorndyke Avenue," with a hand pointing in a southeasterly direction. Up to this point Thorndyke avenue was a graded street, but beyond this point, while there was a well-defined way, it was a narrow, winding road around a steep hillside. This road was rough and muddy, filled with

water, ruts, and stone. The hillsides above and below this road were covered with stumps, brush, and vegetation. The whole country thereabouts was platted into lots, blocks, and streets, but it was a wild country region, without any improvement, and the narrow, winding road was made for the most part over private lands without regard to platted streets. It was about five miles from the business part of the city.

It was apparent that this way was not a city street, and the evidence shows that the city had not opened the same and had refused to do so, and had refused to make improvements thereon. It was also shown that this way was originally a bicycle path, and that certain real estate agents, about a year prior to the date above named, had made the path so that teams might travel over it in order to reach lands beyond, which were offered for sale by such agents. It was also shown that these real estate agents had provided and placed the signboards above mentioned. There is no evidence that the city had authorized the opening of the road or the placing of signboards, but it was shown that the city had refused to open the road or to improve it. Upon one occasion some prisoners had worked for a time upon the road, but the expense of these prisoners was paid for by the real estate agents referred to. When the automobile turned into this road, it was daylight and the condition of the road was plainly apparent.

All the plaintiff's witnesses testified that the condition of the road was very bad, and one witness testified that "for about a block it was terrible. . . . The auto was jumping up and down a good deal." After traveling along this road for a distance of about six hundred feet, the automobile, by reason of the rough condition of the road, ran off the side of the road, overturned, and the appellant's mother was killed. At the point where the automobile turned over, a platted street crossed the road, but this platted street was a steep hillside, covered with vegetation, with no semblance

of an actual street. The trial court was of the opinion that the driver of the automobile was guilty of contributory negligence in attempting to travel the road, and that the road was not a way or street which the city was bound to repair, and for that reason directed a verdict in favor of the defendant.

We are of the opinion that the trial court was right. The way was proven by the plaintiff to be a private way over private lands, which the city would have no right to improve if it so desired. The way was constructed by private parties for their own purposes. The signboards were also placed by the same parties. The city had refused to exercise any control over the way. It is true that the point where the injury occurred was where a platted street intersected the road at right angles, but this platted street had never been opened at that point and, of course, the city was under no obligation to keep it in repair. The accident was an unfortunate one, but the facts show clearly that the city was not responsible for it, because it was under no legal obligation to maintain the way, and had never assumed to do so. To hold the city liable under the facts shown in this case would make it an insurer of the lives and limbs of travelers on byways and private roads within the corporate limits thereof, under all conditions, and in any sort of vehicles. This is not the rule.

The judgment must therefore be affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8660. Department Two. June 14, 1910.]

In re SIXTH AVENUE WEST, SEATTLE.

THE CITY OF SEATTLE, *Respondent*, v. MOUNT PLEASANT CEMETERY COMPANY *et al.*, *Appellants*.[1]

CEMETERIES—EXEMPTION OF LANDS—MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS. A cemetery company organized as a private corporation, which has sold burial lots to be used for that purpose only, is not entitled to the exemption of its unsold property from local improvement assessments, under Rem. & Bal. Code, §§ 3640, 3645, exempting from taxation the lands of cemetery assocations incorporated or conducted under the law relating to charitable associations.

SAME—TAXATION. Rem. & Bal. Code, § 9098, exempting from general taxation all lands used exclusively for burying grounds or cemeteries, does not exempt such lands from assessments for local improvements.

SAME—EXEMPTIONS—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 3640, providing that whenever any part of a burying ground, established by individuals associating for that purpose, shall have been designated and appropriated by the proprietor as the burying ground of any particular person or family, it shall not be liable to be taken or disposed of for any tax or debt whatever, is broad enough to exempt from local assessments the burial lots in a cemetery deeded to private owners, to be used exclusively for burial purposes, although the cemetery is owned by a cemetery company organized as a private corporation for profit, and not as a charitable association as contemplated by Id., § 3639, authorizing the association of individuals for that purpose.

MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—APPEAL—REVIEW—DISCRETION. Upon an appeal from the confirmation of an assessment for a local improvement, findings as to the boundaries of the lands benefited, and the amount of the benefits, will not be disturbed in the absence of any abuse of discretion.

SAME—DECISION. Upon appeal from the confirmation of an assessment for a local improvement, where about half of the land was exempt, and the proportion appears of record, the supreme court will order a proportionate reduction.

APPEAL—DECISIONS REVIEWABLE—DEFAULT JUDGMENT. A judgment rendered by default against a defendant who has not appeared is appealable.

[1]Reported in 109 Pac. 1052.

JUDGMENTS—DEFAULTS. A default cannot be taken against non-appearing defendants for a sum greater than that demanded in the complaint.

MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—PROCEEDINGS—DEFAULT JUDGMENTS—INCREASE OF ASSESSMENT. In proceedings by a city to levy assessments for a local improvement, where eminent domain commissioners have made up an assessment roll and notice has been given to a property owner of the amount of benefits assessed against his property, and the owner files no objections and does not appear, the court in confirming the assessment has no authority to increase the same; since its order has the effect of a default judgment, the hearing being conducted as in other proceedings, under Rem. & Bal. Code, §§ 7791-7797.

Appeals from a judgment of the superior court for King county, Tallman, J., entered January 4, 1910, confirming a condemnation assessment roll for a local improvement, after a hearing on the merits before the court. Modified.

H. R. Clise (*C. K. Poe*, of counsel), for appellants.

Scott Calhoun and *Howard A. Hanson*, for respondent.

PARKER, J.—Under the eminent domain law, Rem. & Bal. Code, § 7768 *et seq.*, the city of Seattle is extending Sixth avenue west and charging the expense thereof by special assessment against the real property benefited thereby. Among the property so assessed, and for which assessments the trial court rendered judgment, is certain land belonging to the Mount Pleasant Cemetery Company, and also certain land belonging to the Washington Cremation Association. Judgment was rendered against the land of the cemetery company, upon a trial after its appearance, and judgment was rendered against the land of the cremation association by default, as it did not appear to resist the proposed assessment. Both judgments are brought here by separate appeals. We will notice them in the order named.

The assessment involved in the appeal of the cemetery company is for the sum of $2,811, charged in a lump sum as a

single assessment against certain land within the replat and the supplemental plat of "Mount Pleasant and Odd Fellows cemeteries." In the year 1895 and prior thereto, part of the land here involved was included in the original Mount Pleasant cemetery plat, and also in the Odd Fellows cemetery plat. In that year the appellant cemetery company acquired this land, and since then has acquired the other land here involved, and has replatted the whole with other lands as above indicated. Since acquiring this land the cemetery company has sold and conveyed a great many burial lots within the land charged with this assessment. The conveyances are all in the form following:

"This Indenture, made this ——— day of ————, A. D. ———, between the Mount Pleasant Cemetery Company, the party of the first part, and ————, the party of the second part,

"Witnesseth, That the said party of the first part, for and in consideration of the sum of ——— Dollars, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain and sell unto the said party of the second part, and to his heirs, for the purpose of sepulture only, for members of his family, ———— Lot No. ——, in Section —— in the Replat of Mount Pleasant Cemetery, in the County of King and State of Washington.

"And the party of the second part, for himself and his heirs, executors and administrators, doth covenant to and with said party of the first part, its successors and assigns, that in consideration of the foregoing grant he will not, neither will they nor any of them suffer said lot or piece of ground to be used for other purposes than those above named, nor will he nor they nor any of them transfer the same nor any part thereof, except upon the assent of said party of the first part, its successors or assigns, and that he and those claiming under or through him will be governed in the management of said lot by all rules and regulations imposed by said party of the first part, its successors and assigns, for the proper management of the cemetery.

"In Witness Whereof, the said party of the first part has

hereunto set its hand and seal the day and year first above written.

"The Mount Pleasant Cemetery Company,
"By ————————, President (Seal)
"Attest:
————————, Secretary (Seal)."

Under the rights acquired by these deeds hundreds of interments have been made in the lots so conveyed. It appears that the cemetery company is a private corporation and conducts this cemetery for the purpose of earning dividends. The technical legal character of the cemetery company as a corporation is not made clear by this record, but it is in any event plain that it is not incorporated or conducted without a view to profit under the laws relating to charitable associations, as cemeteries may be incorporated and conducted under the act of 1899, Rem. & Bal. Code, § 3643 *et seq.* It does not appear from the record that the cemetery company acquired any of the land here involved in trust to be used or sold for any specific purpose. We will notice other facts as may be necessary in our discussion of the questions involved.

It is contended by learned counsel for the cemetery company that its property is exempt from special assessment. To support this view our attention is called to the statutes exempting from taxation and execution burial lots in cemeteries, and also exempting from taxation the land of cemetery corporations under certain conditions. Rem. & Bal. Code, §§ 3640, 3645. The cemetery company disclaims any interest in the lots it has conveyed, save in having the restrictions upon their use observed; so its principal interest in the question of exemption is in having its unsold lands exempt. The fact that appellant is a private corporation conducting this cemetery for profit, we think is a conclusive answer to its claim that its unsold land is exempt from special assessment. It is plain that the sections of the statute above mentioned do not accord any such exemption to land held as this is. It is only cemetery corporations organized and conducted without a view to profit that have any exemption from taxation upon

their unsold lands by virtue of these sections. As to whether or not such exemption would extend to special assessments we need not now decide. Our attention is also called to § 9098, Rem. & Bal. Code, which provides that, "All property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say: First, All lands used exclusively for public burying grounds or cemeteries, . . ." This section is a part of the general revenue law of the state and relates only to general taxation. The rule seems to be thoroughly established that statutes exempting particular property from taxation do not apply to special assessments unless there are words in the statute clearly indicating such an intention—that is, the word "taxation" standing alone does not apply to special assessments in such statutes. 1 Page and Jones, Taxation by Assessments, § 592; Hamilton, Special Assessments, § 312. We are of the opinion that our laws do not exempt the land here involved, not conveyed by the deeds to burial lot owners, from special assessments.

It is also contended that, even though the remaining land of the cemetery company be not subject to assessment, the learned trial court erred in adjudging the charge of $2,811 as a single assessment against the conveyed lots and the remaining land of the cemetery company, it having, at the trial, objected to the assessment being so made. Learned counsel for the city contend that the deeds from the cemetery company to the several grantees do not convey the fee; hence, the land is still under one ownership, is therefore a single tract and assessable as such. Many authorities have been cited and elaborate arguments made touching the nature of the title passing to these grantees. We think, however, the solving of the question of whether or not these burial lots are exempt from assessment will determine the question as to the cemetery company's right to have its remaining land charged separately. If a burial lot conveyed to, and held by, the grantee "for the purpose of sepulture only, for the members

of his family," as these lots were conveyed and are held, is by law exempt from special assessment, then it necessarily follows that the cemetery company has the right to have the assessment upon its remaining land measured according to the benefits resulting to such land separately, and have the amount so assessed charged against such land separate from other land. It would clearly be erroneous and prejudicial to the rights of an owner to have his land assessed with other lands by charging the assessment against all as one tract, when the other lands are exempt from such assessment, upon the theory that the whole is assessable, even though such owner might have some interest in the exempt lands. In this case the learned trial court measured the benefits to the lands charged with this single assessment as a whole, upon the theory that the cemetery company is the owner thereof, and that none of the land is exempt from the assessment. It is plain that the assessment burden which would fall upon the exempt land, were it assessable, cannot be placed upon other land, except possibly by apportioning such burden equitably upon all the lands within the assessment district—in other words, by eliminating such exempt lands from all consideration in measuring the benefits. Prior to the act of 1899, the only statute relating directly to the organization of cemetery corporations and the exemption from taxation and execution of burial lots, was §§ 3639 and 3640 of Rem. & Bal. Code, which are as follows:

"Sec. 3639. Any number of individuals, in any portion of this state, may associate for the purpose of procuring and establishing a burying ground or place of sepulture; and, being so associated, they shall, on complying with the provisions of this section, be a body politic and corporate, may choose a president and other officers, may enact by-laws for regulating the affairs of such corporation not inconsistent with the laws of this state, and compel the observance thereof by suitable penalties, may sue and be sued, and do all acts necessary and proper for the well-ordering of the affairs of such corporation: Provided, that, before any such association shall be entitled to the privileges granted in this section, they shall

lodge with the secretary of state a copy of their articles of association, and shall cause the same to be recorded in the records of the county where such burying ground is situated.

"Sec. 3640. Whenever any part of such burying ground shall have been designated and appropriated by the proprietors thereof as the burying place of any particular person or family, the same shall not be liable to be taken or disposed of by any warrant or execution, for any tax or debt whatever; nor shall the same be liable to be sold to satisfy the demands of creditors whenever the estate of such owner shall be insolvent."

This was the law at the time of the incorporation of the appellant cemetery company, and it appears to be in full force at the present time so far as the exemptions therein provided are concerned, though the act of 1899, Rem. & Bal. Code, § 3643 *et seq.*, provides for the organization of cemetery associations and the exemption from taxation under certain conditions of lands held thereby. This later law relates, however, to cemetery associations organized without any view to profit, as charitable associations are organized. The nature of the incorporation of this cemetery company renders the question somewhat involved, since it might be argued that these family burial lots are not in a cemetery owned by a corporation organized under § 3639 above quoted, since the exemptions provided in § 3640 refers to family burial grounds in such a cemetery. Notwithstanding there may be some question as to the technical legal status of this cemetery company as a corporation, in view of the manner and purpose of its platting and conveying these lots for the purpose of sepulture, only, for members of the families of the grantees, we conclude that the question of the exemption of the lots from special assessment is to be determined by the language of § 3640. It will be noticed that the exemption language of that section is very broad and comprehensive. It is that such family burial grounds "shall not be liable to be taken or disposed of by any warrant or execution for any tax or debt whatever." This language, it seems to us, is sufficiently com-

prehensive to include special assessments. Many authorities have been cited touching exemptions under statutes of similar import, though none using this exact language. And while we recognize the general rule that a mere exemption from "taxation" does not exempt from local assessments, each case must largely depend upon the language of the statute giving the exemption. In view of the language of § 3640, we are of the opinion that the lots conveyed by the cemetery company by deeds in the form above quoted thereby became exempt from special assessment as well as from general taxation. The following authorities lend support to this view: *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732; *Mt. Auburn Cemetery v. Cambridge*, 150 Mass. 12, 22 N. E. 66, 4 L. R. A. 836; *State ex rel. Oakland Cemetery Ass'n v. St. Paul*, 36 Minn. 529, 32 N. W. 781; *Louisville v. Nevin*, 10 Bush. (Ky.) 549, 19 Am. Rep. 78; *Swan Point Cemetery v. Tripp*, 14 R. I. 199; *Oakland Cemetery v. Yonkers*, 63 App. Div. 448, 71 N. Y. Supp. 783, affirmed by the Court of Appeals, 182 N. Y. 564, 75 N. E. 1132. It follows that the cemetery company had the right to have its unsold land assessed separately. The cemetery company is not insisting that the assessment be apportioned upon the platted tracts of its unsold land according to the plat, so we need not pass upon its rights in that regard.

It is further contended that the boundaries of the assessment district were unreasonably extended so as to include portions of this land belonging to the cemetery company not benefited by the improvement; and also that the amount of the assessment was, in any event, greater than the benefits received. After careful reading of all the evidence we cannot say that there was an abuse of discretion in the determination of these matters, assuming for the moment that all of the land, including the burial lots conveyed, was assessable, this being the theory upon which the learned trial court fixed the amount of the assessment. It does not follow, however, that this whole sum of $2,811 can be lawfully charged

as an assessment against appellant's land which is not exempt. The remaining land of the cemetery company is chargeable only with such portion of this total sum as the benefits resulting thereto bear to the benefits which would result to the entire tract attempted to be assessed were none of it exempt. This being an appeal from a judgment of the superior court rendered in a cause triable in that court without a jury, and all of the evidence upon which that court disposed of the case being before us, we deem it our duty to determine the amount assessable against the land of the cemetery company which is not exempt. There appears to be no dispute or uncertainty as to the number and location of the lots the cemetery company has conveyed for family burial purposes. These lots are shown by a plat filed as an exhibit in the case, from which it appears that considerable more than half of the land involved attempted to be assessed, lying within six or seven hundred feet of the improvement, has been so conveyed; and hence, as we have seen, a considerably less than half of this land within that distance of the improvement is assessable. Other portions of the land charged with this assessment are apparently too remote from the improvement to be very materially benefited thereby, especially in view of other streets immediately adjacent thereto already dedicated. We find that $1,200 would be a fair proportion of the total attempted assessment of $2,811 to be charged against the land of the cemetery company, excluding lots sold for burial purposes.

We will now consider the appeal of the cremation association. It appears from the record that, upon the filing of the assessment roll by the eminent domain commissioners, they assessed the land of the cremation association at $130. Notice of hearing upon the roll being given in usual form, the cremation association did not file any objections thereto or appear at the hearing, when the court by its judgment raised the assessment from $130 to $420; thus in effect rendering a judgment by default for a greater sum than that charged

upon the roll, and to which appellant was invited to file objections.

Learned counsel for the city moved to dismiss the appeal of the cremation association for want of proper assignment of error. It is plain from appellant's brief that it claims that the learned trial court was in error in rendering judgment against its land for an amount greater than the assessment, since it did not appear or offer objections to the roll, and the judgment was rendered by default. This court has held that a judgment rendered by default, against a defendant who has made no appearance in the case, is appealable. *Rhode Island Mtg. & Trust Co. v. Spokane*, 19 Wash. 616, 53 Pac. 1104. The motion must therefore be denied. It is elementary that the relief granted to the plaintiff in a case in which the defendant has not appeared connot exceed that which is demanded in the complaint. Such a judgment is clearly erroneous. *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534; 23 Cyc. 741.

The question then is, Is this rule applicable to this case? A review of the statute under which this proceeding is prosecuted shows clearly that it is a judicial proceeding. The determination of the court upon the confirmation of the assessment roll has the force of a judgment. Rem. & Bal. Code, § 7797. The eminent domain commissioners are required to make up the assessment roll and charge against each tract or parcel of land the amount assessed as special benefits thereto. Upon the filing of the roll, the court enters its order setting a time for hearing thereon, notice is then given to owners inviting them to file objections to the roll and advising them of the amount charged against their property. It is further provided that:

"Any person interested in any property assessed may file objections to such report at any time before the day set for hearing said roll. As to all property to the assessment of which objections are not filed as herein provided default may be entered and the assessment confirmed by the court."

There are certain other provisions indicating that the court may either raise or lower any assessment upon a given tract when the owner has appeared and filed objections, but there is nothing in the law to indicate that the court may raise an assessment upon any tract the owner of which has made no objection and has not appeared. It is further provided that, "The judgment of the court shall have the effect of a separate judgment as to each tract or parcel of land or other property assessed." It is also provided that the hearing shall be conducted as in other cases tried by the court without a jury. Rem. & Bal. Code, §§ 7791-7797. We think, under these provisions, this proceeding must be regarded as any other suit, and the rights of the property owners, who are in effect defendants therein, protected accordingly. We are clearly of the opinion that the court has no more authority in this proceeding than in any other suit or action to render a default judgment against a lot or tract for a larger sum than is charged upon the assessment roll. The roll is in effect the complaint, and if the property owner does not care to object to the assessment which it is thereby proposed to levy upon his property, he has all the rights of a defendant in an ordinary action who suffers a default judgment to be entered against him by not appearing or answering in the cause. We are of the opinion that the judgment against the property of the cremation association, assessing it more than the $130 charged against it upon the roll, was erroneous, and that appellant is entitled to have such judgment modified by reduction of the assessment to that sum.

We conclude that the judgment of the learned superior court must be modified as follows: *First*, the superior court is directed to modify its judgment by assessing against the land of the cemetery company, excluding the burial lots conveyed by it, the sum of $1,200, and no more. *Second*, the superior court is directed to modify its judgment by assessing against the land of the cremation association the sum of

$130, and no more. The appellants will recover their costs in this court.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 8650. Department Two. June 16, 1910.]

GERTRUDE HERKENRATH, *Respondent*, v. MAX RAGLEY, *Appellant*.[1]

FRAUDS, STATUTE OF—AGREEMENTS AFFECTING REAL ESTATE. An oral agreement by a real estate agent having land for sale that if the plaintiff would purchase the land from the owner he would resell it within nine months, or if failing to so do, would refund the purchase price, is not an agreement for an interest in real estate within the statute of frauds.

CONTRACTS—CONSIDERATION. That a real estate agent was enabled to earn his commissions on a sale of real estate is a sufficient consideration for his promise to the purchaser to make a resale within nine months or refund the purchase price.

Appeal from a judgment of the superior court for King county, Gay, J., entered November 24, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Reeves Aylmore and *J. L. Corrigan*, for appellant.

Walter S. Fulton and *Edward Von Tobel*, for respondent.

MOUNT, J.—The respondent brought this action to recover $4,500 with interest. The case was tried to the court and a jury. A verdict was returned in favor of the plaintiff, and a judgment entered for the full amount of plaintiff's claim. The defendant has appealed.

The facts are as follows: The appellant was a real estate agent. He was offering for sale as such agent a piece of real estate for $13,000. The plaintiff was well acquainted with

[1]Reported in 109 Pac. 279.

him, and having some money to invest belonging to her brother, she went to the appellant and explained that she desired to purchase a piece of real estate in Seattle for $4,500. The appellant then told her that he had a purchase of $13,000 which could be bought by the plaintiff for $4,500 cash, and the balance on time. She declined to make the purchase because she stated she did not have any more money and did not intend to go in debt. The appellant then told her that, if she would make the first payment, $4,500, he would resell the property within nine months and that, if he did not do so, he would refund the $4,500 with legal interest at the end of that period, and take the title of the property in himself. Respondent agreed to this, and paid the money to the appellant. The property was then conveyed by the owner to the respondent, who gave a mortgage back for the balance of the purchase price. The appellant did not sell the property within the nine months, and thereupon the respondent tendered a deed to the appellant and demanded a return of the money which she had given him. There was no written contract between the appellant and respondent.

Appellant argues that no recovery can be had, because the contract was an oral contract respecting an interest in lands, and therefore void within the statute of frauds. *Chamberlain v. Abrams*, 36 Wash. 587, 79 Pac. 204, is relied upon to support this contention. That was a case where the defendant orally agreed to acquire the title to certain lands and convey them to the plaintiff. The contract there was clearly a contract for the purchase of lands within the statute, and for that reason we held that the plaintiff could not enforce the contract; and, because it was not enforceable, we held there could be no recovery for its breach. In the case at bar, the appellant was not a party to the sale of the land. He was the agent for the seller. The contract between the appellant and respondent was a collateral contract which did not affect the title or any interest in the land sold. The appellant simply agreed that, if the respondent would pur-

chase the land from the owner, appellant would resell it within nine months and, if he failed to do so, he would repay the $4,500 to the respondent. The consideration for this agreement was that the respondent should deliver the $4,500 to him, and title would thereupon be conveyed to her. The appellant would thereby make a sale and earn his commissions. This was a sufficient consideration for the contract. *Dickinson v. Zubiate Mining Co.* (Cal.), 106 Pac. 123.

In *Little v. McCarter*, 89 N. C. 233, the defendant orally agreed to pay plaintiff $100 if plaintiff would purchase a piece of land from a third party for $2,000. Plaintiff purchased the land, and in an action to recover the $100, it was held that the contract was not within the statute of frauds. In *Wetherbee v. Potter*, 99 Mass. 354, where two parties agreed to furnish the money in equal shares and purchase land at the price of $50,000, one of the parties failed to furnish his share, and the other advanced the purchase price and brought an action to recover the share promised by the defendant, on a count for money paid. The court in that case said:

"The statute of frauds does not apply to such an action, whether brought upon the implied or an express agreement. The obligation to repay money advanced for the use of the defendant is independent of the character of the consideration upon which the advance is made, provided it be not illegal. And if an express promise to that effect be separable from the principal agreement to which it is incident, it may be enforced, although the principal agreement might be avoided. The fact that a certain stipulation is made at the same time, and forms a part of an agreement for the sale of an interest in land, does not prevent an action from being maintained upon it; provided, 1st, that the action does not tend to enforce the sale or purchase of the interest in land, and 2d, that, in other respects, the stipulation is susceptible of being separately enforced by action. Such stipulations, collateral to the sale, but contained in the same contract, have been repeatedly enforced in this commonwealth."

In *Brown v. Hobbs*, 147 N. C. 73, 60 S. E. 716, where the defendant, in order to induce the plaintiff to sell land at a price of $1,500, agreed by parol to pay the plaintiff one-half the amount in excess of $1,500, which he might receive for the land when sold, and the defendant afterwards sold the land for $2,275, in an action to recover one-half the excess over $1,500 it was held that the contract was not within the statute of frauds, but was collateral to and independent of the contract and deed. See, also, *Fraser v. Child*, 4 E. D. Smith (N. Y. Com. Pleas) 153. We are of the opinion in this case that the agreement between the appellant and the respondent falls within the principle of these cases, and was not an agreement for an interest in real estate, but was money advanced by the respondent to the appellant for his use. The title of the real estate might have been taken in the appellant as well as in the respondent. If it had been taken in appellant's name, there could have been no reasonable argument that he was not liable to respondent for money had and received. The fact that the title was conveyed to the respondent instead of the appellant, did not change the relation of the parties with respect to their agreement.

We think, therefore, the judgment was right, and it is affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8622. Department One. June 16, 1910.]

WILLIAM BOWMAN *et al.*, *Respondents*, v. LULU HARRISON, *Appellant*.[1]

PARTNERSHIP—FIRM NAME—ACTIONS—STATUTE—EFFECT. Rem. & Bal. Code, § 8369, is directed against concealed partnerships, and it is not necessary to plead and show a compliance therewith in order to maintain an action, where the firm name discloses the surnames of the partners.

SAME—CAPACITY TO SUE—WAIVER—DEMURRER. Failure to plead or show a compliance with Rem. & Bal. Code, § 8369, directed against concealed partnerships, goes only to the capacity to sue, and is waived unless raised by demurrer.

LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—PARTNERSHIP. The notice to pay rent or quit in unlawful detainer of leased premises is sufficient if signed in the firm name of the landlords, where they were doing business as partners under their own surnames.

LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT. Rem. & Bal. Code, § 812, subd. 2, providing that a tenancy for an indefinite term may be terminated on twenty days' notice, has no application to the alternative notice to pay rent or quit where possession is continued after default, on three days' notice, as provided in Id., subd. 3.

Appeal from a judgment of the superior court for King county, Shackleford, J., entered September 23, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of forcible entry and detainer. Affirmed.

Z. B. Rawson, for appellant.

Andrew R. Black (*Ralph Simon*, of counsel), for respondents.

CHADWICK, J.—Defendant's predecessor went into possession of certain premises owned or controlled by plaintiffs, under an oral contract for a written lease for a definite term. This lease was never executed, and defendant has continued in

[1]Reported in 109 Pac. 192.

possession, paying rent from month to month. Default being made in the payment of rent for the month of April, 1909, plaintiff caused the statutory notice to pay the rent or vacate the premises within three days to be served upon defendant. Following a refusal to comply with the terms of the notice, this action was begun under the unlawful detainer statute. From a judgment in favor of plaintiffs, defendant has appealed.

It is first assigned as error that, plaintiffs being a copartnership, they could not maintain this action without pleading and showing compliance with chapter 145, page 288, Laws of 1907 (Rem. & Bal. Code, § 8369 *et seq.*), which is directed against concealed partnerships. Reference to that statute will show that it has no reference to a partnership where the names of the parties are disclosed in the accepted firm name, as they are in this case. If it were otherwise, the case would fall within the rule of *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031, wherein a similar statute was held to go only to the capacity of the party to sue, and the objection would be deemed to be waived unless raised by demurrer or answer. For the same reasons, compliance with the law is not essential to the validity of the notice to pay rent. The notice was signed "Bowman & Collins." It is said that this violates the law, in that notice is the first step under the unlawful detainer statute, and must, therefore, comply with its terms, as it and all other actions are limited and qualified by the statute first referred to. In this connection our attention is called to the case of *Sutton & Co. v. Coast Trading Co.*, 49 Wash. 694, 96 Pac. 428, as supporting appellant's contention. Reference to that case will disclose the fact that the partnership there under consideration fell within the terms of the statute as one of the "certain partnerships," referred to in the opinion.

Lastly, it is contended that, inasmuch as the appellant was holding under an indefinite term, she could only be ousted upon twenty days' notice. Subdivision 2 of section 812, Rem.

& Bal. Code, provides that the landlord, in the event that he desires to terminate a tenancy held under an indefinite term, must give twenty days' notice. No mention is made of, nor was it the intent of this subdivision of the statute, to cover a default in rent. That contingency is covered by subdivision 3 of the same section. It is there provided that, where possession is continued after a default in rent, the landlord may give the alternative of paying rent or quitting possession within three days. Respondents' pleadings bring them within this subdivision of the statute.

Other questions are raised in the brief but, as we have no statement of facts before us, we cannot discuss them.

Finding no merit in the assignments of error, the judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8637. Department One. June 16, 1910.]

HENRY H. JOHNSON, *Respondent*, v. PACIFIC BANK & STORE FIXTURE COMPANY, *Appellant*.[1]

PLEADING—AMENDMENT—WAIVER OF OBJECTIONS. The allowance of the filing of a so-called supplemental complaint as an amended complaint cannot be urged as error after issue joined and trial and judgment on the merits.

MASTER AND SERVANT—EMPLOYMENT—CONTRACT—CONSTRUCTION—TERMINATION—SALARY. A contract of employment for one year, which provided for sixty days' notice in the event of a discharge without fault of the employee, entitled the employee to salary for that period in the event of his summary discharge before the expiration of ten months, or to one year's salary if discharged after ten months.

SAME. A contract of employment wherein the employee is guaranteed one year's employment, or the expense of moving to the Pacific coast if discharged before the expiration of one year, does not entitle him to more than one year's salary, if discharged during the year.

[1]Reported in 109 Pac. 205.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 28, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Modified.

H. E. Foster, for appellant.

Corwin A. Townsend and *Allan R. Joy*, for respondent.

CHADWICK, J.—On February 16, 1908, plaintiff began service with defendant's predecessor as superintendent and general manager of its business. Defendant succeeded to the interests of the contracting party, and the employment was continued under the original contract. At the time the contract was made, plaintiff was a resident of Wauwatosa, Wisconsin. That part of the contract material to our present discussion follows:

"It is further agreed by the parties to this instrument, that if either party wishes to terminate this contract, the other party not being in fault, the party so desiring to terminate the agreement shall give sixty (60) days' notice in writing to the other party of such desire to sever the relationship."

Following the original draft of the contract, there was some correspondence between the parties. In a letter addressed to defendant's president, plaintiff said:

"In regard to the contract which your attorney drew up, I see nothing objectionable in this contract except the sixty day clause which he has added. . . . If, however, you desire to insert a clause allowing for sixty days' notice, I will not object to it, provided you put in a clause guaranteeing me the expense I am put to in moving from Milwaukee to Seattle, provided you desire to terminate the contract before my year expires. If you will stop to consider the matter you will see my position is right, as I am going to an expense of between four and five hundred dollars to make this change, and I cannot afford to make it unless you guarantee the expenses, or guarantee me one full year's work at the rates agreed upon in the contract."

In reply the president said:

"I have told my attorney to insert in the contract the clause you speak of guaranteeing your expenses making this change if for any reason I should want to terminate the contract before the end of the year. Regarding the sixty days' notice clause, I certainly had no idea that any condition should arise that might compel either of us to terminate the contract before the year is out, or at the end of the year. It was simply a suggestion of my attorney to guard against contingencies. I send you the contract with the clause inserted, and trust you will find it satisfactory."

Plaintiff continued in the employ of defendant until December 5, 1908, as the jury found, when he was summarily dismissed by the "overt act of defendant," as the complaint says and the testimony confirms. Defendant refused to pay more than one-half of the November salary, and on December 3 plaintiff began an action for $104.17, and on December 7 he filed what he termed a supplemental complaint setting up his whole cause of action; that is, a breach of the contract, and demanding $104.17 for salary unpaid in November, $34.70 for five days' time in December, $416.34 due under the sixty-day clause in the contract, and $408.45 for moneys expended in moving himself and family from Wisconsin to Seattle. He recovered the full amount demanded, and defendant has appealed.

It is first urged that the court erred in refusing to strike the so-called supplemental complaint from the files, as improperly filed and containing matter improper to be set up in a supplemental complaint. The trial judge held the second complaint to be an amended complaint and not supplemental to the original complaint. This, we think, was proper. The character of the pleading will not be measured by the style or title affected by the pleader, but rather by reference to its substance. The pleading complained of set up respondent's whole cause of action. Appellant answered, and every difference existing between the parties was tried out on the merits. To send the case back upon a ground so technical,

after verdict and judgment, would be to sacrifice substance to form, a condition from which the law is happily emancipating itself.

It was the theory of the lower court that the salary for the sixty days was due as liquidated damages, and much of the brief is taken up with the question whether it is or, as appellant contends, a penalty which will not be enforced in terms. To follow the argument of counsel can avail nothing. It is enough to say that the parties were competent to contract, and did provide that, in the event of a discharge without fault of the respondent, he should have sixty days' notice. This can mean but one thing, that is, that appellant would continue respondent's employment for sixty days or, in the event of summary dismissal, would pay his salary for that time. Appellant is bound by the terms of its contract, and was properly charged with the added salary.

We cannot, however, follow the court in the allowance of the expenses of moving the respondent and his family from Wisconsin to Seattle. The gist of the contract is that respondent should have employment for one year at a stated salary. Respondent has put his case more clearly than we can in the letter quoted above. It will be seen that he says that he could not afford to make the change unless guaranteed one year's salary. It is evident that, if respondent recovers a year's salary, he cannot recover pay for sixty days in addition thereto, or the expense of moving. He is entitled to sixty days within the year but not beyond it. If respondent had been discharged at six months, he would recover eight month's salary and the cost of moving; if at ten months, he would recover for the year, but nothing for the cost of moving. He is entitled to one year's salary, and when he recovers it, the contract, which being construed in the most favorable light for respondent is nothing more than a guaranty of one year's salary, is fully performed.

Respondent is therefore entitled to recover salary from November 15, to February 11, or $597.17. The judgment

will be reduced to cover this sum. This case will be remanded with instructions to the lower court to so modify its judgment. Appellant will recover costs in this court.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8724. Department One. June 16, 1910.]

JULIA DALY, *Appellant*, v. S. RIZZUTTO *et al.*, *Respondents*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—VENDOR AND PURCHASER—NOTICE. *Bona fide* purchasers from a married man, describing himself in the deed as single and unmarried, are not charged with notice that it was community property, although some of his associates knew that he was married and diligent inquiry might have disclosed the fact, where for several years the grantor had lived in this state separate and apart from his family in a distant state, the community had never occupied the land or made conveyances, and there was no fact or circumstance which would raise a duty in the grantee to inquire.

SAME—ESTOPPEL OF WIFE—BONA FIDES—BURDEN OF PROOF. Where community property is acquired and sold in this state in defiance of the community rights of the wife in a distant state, proof that the grantee was a purchaser for value and that the title was clear makes out a *prima facie* case of *bona fides* and puts the burden upon the wife to prove notice of her equity.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 17, 1909, upon granting a nonsuit, dismissing an action to cancel a deed and recover possession of real property, after a trial on the merits before the court. Affirmed.

Heber McHugh and *John T. Casey* (*Milo A. Root*, of counsel), for appellant.

Gill, Hoyt & Frye and *R. L. Blewett*, for respondents.

CHADWICK, J.—Plaintiff, Julia Daly, and Joseph P. Daly were married at Chicago, Illinois, in December, 1888. About

[1]Reported in 109 Pac. 276.

May 15, 1903, Joseph P. Daly deserted his wife and family and came to Seattle. He did not make his whereabouts known to his wife, but in August, 1904, his wife found him to be working for the Northern Pacific Railway Company as a switchman. From that time on he corresponded with his children, and wrote a few letters to his wife, evidently in answer to letters received from her with reference to the children, and the home in Chicago which was under mortgage and about to be sold. The defendant Daly at all times seems to have desired that his children be sent to Seattle. He finally obtained transportation for them, but plaintiff returned it because she did not want the children to travel alone. He never sent plaintiff any money, although the testimony shows that he was in funds, having paid $650 for a team of horses. His wages were about six dollars a day. Mrs. Daly came to Seattle in April or May, 1905, and stayed about one month, when she returned to Chicago. In August, 1907, she came to Seattle with her children, and has since resided there. Several employees in the Northern Pacific yard testified that they and others employed with Daly knew him to be a married man. On February 20, 1906, defendant Daly purchased from the Hill Tract Improvement Company a lot in the city of Seattle. On November 16, 1906, he conveyed this property, describing himself as a single and unmarried man. On the 17th day of November, 1906, his grantee sold and conveyed the property to the defendants Rizzutto, who are now in possession of the property. Mrs. Daly was in Seattle about one year when, at the suggestion of others that her husband had bought property, she caused inquiry to be made which developed the facts as we have related them. Mrs. Daly brought this action to recover possession of the property, asserting it to be community property. Her husband refusing to join as a plaintiff, was made a defendant. Upon a trial a nonsuit was granted, and plaintiff has appealed. We shall refer to defendants Rizzutto as respondents.

Appellant relies upon the cases of *Dane v. Daniel*, 23 Wash.

379, 63 Pac. 268, and *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074; while respondents rely upon *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030, and § 8771, Rem. & Bal. Code. In *Dane v. Daniel*, it was held that failure to assert a claim to community property held in the name of a husband did not estop the wife from claiming an interest therein, except as against such *bona fide* purchasers as purchased without knowledge of the existence of the marriage relation, or who could not by the exercise of reasonable diligence have obtained such knowledge. In *Sadler v. Niesz*, the wife was denied an interest in the property claimed to be community property. The parties had been married in 1863. They lived together for eight years, when the husband came to the Pacific Coast, taking up his residence in Kitsap county. Sadler's family remained in the East, and the fact that he was married was unknown to his associates and acquaintances. He represented himself to be a widower. In 1883 he acquired the lands which became the subject of the suit. In 1889 Mrs. Sadler appeared and asserted her claim to the land. While the result of that case is certain, the ground upon which the decision should properly be made to rest has been the subject of debate and controversy by the bar, and the occasion of much doubt on the part of the courts. The question has been put to this court in subsequent cases, but it being possible to decide the particular case on other grounds, it has not been answered. It is sufficient to say that, up to this time, no absolute rule has been laid down by this court, but each case has been met by reference to its own facts.

The facts in this case, in our judgment, are wholly insufficient to put respondents or their grantors upon notice. The record title stood in the name of Joseph P. Daly. The community had never occupied the property, nor had there been any conveyances or instruments of record which would indicate any ownership other than that of Daly, and he had, by the most solemn assurance, represented and acknowledged himself to be a single man. It is not shown that respondents

or their grantors knew that Daly was employed as a switchman in the Northern Pacific yards, and even though the testimony showed this fact, it would not be enough to put them upon notice, for it in no way suggested to a stranger anything with reference to his domestic status, or gave the slightest clue for inquiry upon the subject-matter of the transfer. In this class of cases, and particularly so since the enactment of our statute, the term "notice" must be taken in its full legal sense. It need not be actual, nor amount to full knowledge, but it should be such "information, from whatever source derived, which would excite apprehension in an ordinary mind and prompt a person of average prudence to make inquiry." *Bryant v. Booze*, 55 Ga. 438; *Phillips v. Reitz*, 16 Kan. 396. It follows, then, that it is not enough to say that diligent inquiry would have led to a discovery, but it must be shown that the purchaser had, or should have had, knowledge of some fact or circumstance which would raise a duty to inquire. Implied notice arises from knowledge and not from ignorance, unless the law charges notice by registry or other token. *McCallum v. Corn Products Co.*, 131 App. Div. 617, 116 N. Y. Supp. 118.

"There must appear to be, in the nature of the case, such a connection between the facts discovered and the further facts to be discovered, that the former may be said to furnish a clue—a reasonable and natural clue—to the latter." *Birdsall v. Russell*, 29 N. Y. 220, 250.

See, also, *Johnson v. Erlandson*, 14 N. D. 518, 105 N. W. 722.

In *McFarland's Adm'r v. Louisville & N. R. Co.*, 130 Ky. 172, 113 S. W. 82, it was urged, as in this case, that the defendant well knew the facts or "that the said knowledge was easily accessible to him." The court said:

"The fact that a person could learn of a thing is not equivalent to knowledge, especially where the facts alleged do not show that there was anything to put him upon notice."

In Michigan it has been held—*Millar & Co. v. Olney*, 69

Mich. 560, 37 N. W. 558—that it is well settled that, if one has knowledge or information of such facts as would lead an ordinarily prudent man to make inquiry as to the rights of others in property he is about to purchase, he must be charged with notice of such facts as inquiry would have discovered. But by the way of emphasizing the fact that there must be a leaven of knowledge or information, the court proceeds to say:

"This court has never gone to the extent that, solely upon failure to inquire of the mortgagor as to prior incumbrances or prior conveyances, one is to be charged with notice of such incumbrances or conveyances; and we are aware of no case in any court that holds to this doctrine. The extent to which the cases have gone is that, where the fact of a prior conveyance or incumbrance is brought to the knowledge of the subsequent purchaser or incumbrancer, he must be held to take subject to such prior conveyance or incumbrance, or, when such circumstances are shown to exist as would put an ordinarily prudent business man upon inquiry as to such prior conveyance or incumbrance, then he is charged with notice of such facts as upon inquiry he could have ascertained; but where circumstances alone are relied upon, with no proof of actual knowledge, they must be of such character that failure to make the inquiry amounts to bad faith."

In that case, as in this, it was not shown that there was the least intimation or hint from any source that a third party had any interest in the property.

When these rules are considered, in connection with the fact that the husband and wife were living separate and apart, she in a distant state, and that the property had been acquired and sold by the husband in defiance of the community's rights, if it be held that a community exists under such circumstances, it would seem that respondents exercised the diligence put upon ordinarily prudent persons, and are entitled to claim as *bona fide* purchasers under the statute. This case is easily distinguished from *Dane v. Daniel*, where the property has been formerly occupied by one of the parties and his wife. They had made a number of conveyances as

husband and wife, all of which had been recorded, and the other party and his wife had lived for more than ten years in the county and were well known to be husband and wife. The case is more like *Attebery v. O'Neil*, 42 Wash. 487, 85 Pac. 270, where the court said:

"A purchaser must, no doubt, exercise due diligence to ascertain the status of his several grantors at the time they acquired and conveyed the property, but he is not bound to go outside of and beyond the record to ascertain whether any such grantor had an equity in the premises before he acquired his title, and whether he was married or single when such equity was acquired. If such were the case, records and deeds would be of little avail, and the evils resulting from the adoption of such a rule would far outweigh any benefits to be derived from it."

In her reply brief appellant contends that, in any event, the case should be reversed and the respondents put to the proof of *bona fides*. It is not denied that respondents' grantor was a purchaser for value, or that the record title was clear. This raised the presumption that the purchaser was without notice, and put the burden on appellant to prove notice of her equity.

"Proof of such payment, in the absence of proof of notice, or of any fact sufficient in law to charge notice, or sufficient to put the purchaser upon inquiry, will raise the presumption that his purchase was without notice, and the *onus* will be upon the one asserting an equity in the property to prove notice thereof to such purchaser." *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801.

See, also, *Atkinson v. Greaves*, 70 Miss. 42, 11 South. 688, and cases cited; 13 Ency. Evidence, 901.

In *Millar & Co. v. Olney*, *supra*, it was said:

"We are of the opinion that there is nothing shown in this case that would have put an ordinarily prudent business man on inquiry, and that there was no question of fact to go to the jury for a finding upon this part of the case."

For the reasons assigned, the judgment is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8648. Department Two. June 16, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Paul K. Mohr, Appellant*, v. THE CITY OF SEATTLE *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS—ORDINANCES—REFERENDUM—PETITION—RIGHT TO WITHDRAW NAME. A person signing a referendum petition, required to be signed by a certain percentage of the voters of a city, has the right to withdraw his name therefrom before the jurisdiction of the officer to whom it is addressed attaches; but not after final action has been taken thereon.

SAME—NUMBER OF SIGNERS—DETERMINATION. Under Seattle City Charter, art. 4, providing that a certain percentage of the voters may invoke the referendum, and that the city comptroller shall verify the sufficiency of the signatures and transmit it with his report to the city council, whose only duty is to then submit the question to the voters, the sufficiency of the signatures to the petition is to be determined by the city comptroller, and after his report is made a person signing the petition cannot withdraw his name therefrom.

SAME—SUBMISSION OF REFERENDUM—DUTY OF COUNCIL. Under art. 4, Seattle City Charter, after a sufficiency of signatures to a referendum petition has been determined by the city comptroller, the city council has no discretion in the matter except to submit the question.

SAME—ACTION TO ENFORCE REFERENDUM—PARTIES—RIGHT TO SUE. A voter and petitioner entitled to sign a referendum petition may maintain an action to compel the city council to act thereon.

Appeal from a judgment of the superior court for King county, Main, J., entered December 2, 1909, dismissing an action for an injunction, after a trial upon an agreed statement of facts. Reversed.

Walter S. Fulton, for appellant.

Scott Calhoun, J. E. Bradford, Harold Preston, and *Hughes, McMicken, Dovell & Ramsey*, for respondents.

RUDKIN, C. J.—This action was instituted to enjoin the city of Seattle and its officers from acting under or enforcing

[1]Reported in 109 Pac. 309.

the provisions of a certain city ordinance, and to compel the defendant city, through its mayor and city council, to submit such ordinance to the qualified voters of the city for their approval or rejection, under the referendum provision of the city charter. The facts which gave rise to the present controversy, so far as deemed material, are as follows: On the 27th day of July, 1908, the city council of the city of Seattle passed Ordinance No. 19,077 entitled, "An ordinance granting to the National District Telegraph Company, of Seattle, its successors and assigns, the right to establish and conduct in the city of Seattle an electrical protection system, and to lease from other persons or corporations wires or conduits for the operation of such system, and to construct and maintain wires upon poles owned by any corporation or person upon obtaining the consent of such corporation or person, and to operate such system for the assistance of the fire and police departments of the city of Seattle;" which was not an emergency law or ordinance, within the meaning of the referendum provision of the charter. On the 10th day of August, 1908, the ordinance was vetoed by the mayor. On the 8th day of September, 1908, the city council passed the ordinance over the veto. On the 7th day of October, 1908, a petition invoking the referendum was filed with the city comptroller. On the 2d day of November, 1908, the city comptroller verified the sufficiency of the signatures to the petition, and transmitted the petition, together with his report thereon, to the city council, as required by the charter. This report showed substantially the following facts:

"That eight per cent (8%) of the total vote cast for mayor at the last general election, to wit, 29,581, equals 2,367.

"That said petition contains the purported signatures of 5,127 qualified voters.

"That of said 5,127 names, 3,650 names appear on the registration books of the city for the year 1908, which number is 1,313 more than the number required by the city

charter to make it mandatory that the city council submit said ordinance No. 19,077 to a vote of the people.

"That a petition containing the purported signatures of 1,032 signers of the original referendum petition, aforesaid, has been filed with the city clerk this 2nd day of November, 1908, requesting a withdrawal of their names from said referendum petition, which said petition has not been checked."

After the referendum petition and the comptroller's report thereon had been transmitted to the city council, and before any further action was taken by that body, further petitions were filed, containing additional withdrawals from the referendum petition. Upon the receipt of the petitions containing these additional withdrawals, the city council referred the referendum petition, the comptroller's report, and withdrawal petitions to its corporation committee. The corporation committee then requested the city comptroller to compare and check over the signatures to the different petitions, with a view of ascertaining how many of the signatures to the referendum petition were also on the withdrawal petitions. The comptroller complied with this request and reported back to the committee that of the 3,680 names of qualified electors on the referendum petition, 979 withdrew their names under the withdrawal petitions filed with him and referred to in his report to the city council, and 760 additional names appeared on the withdrawal petitions filed subsequent to that report. On the report of its corporation committee, the city council determined that the referendum petition did not contain the requisite number of signatures, after deducting all withdrawals therefrom, and rejected the same.

From the foregoing statement it will be seen that the original referendum petition contained a sufficient number of signatures; that the petition was still sufficient after deducting the withdrawals made or filed before the comptroller made his report and transmitted the petition to the city council, but was insufficient if the withdrawals made or filed subse-

quent to the report of the comptroller are considered and allowed. The material provision of the city charter is the following:

"The referendum may be invoked by petition bearing the signatures of the required percentage of qualified voters as to any nonemergency law or ordinance, or any section, item or part of any such law or ordinance, which petition shall be filed with the city comptroller before the day fixed for the taking effect of the said law or ordinance, which shall in no case be less than thirty (30) days after the final favorable action thereon by the mayor and the city council, acting in their usual prescribed manner as the ordinary legislative authority of the city, and the filing of such referendum petition as to any such ordinance or section, item or part thereof, shall operate to suspend the taking effect of the same, or any further action thereon, except as hereinafter provided, viz., the city comptroller shall verify the sufficiency of the signatures to the petition and transmit it, together with his report thereon, to the city council at a regular meeting not less than (20) days after the filing of the petition. The city council shall thereupon provide for the submitting of said ordinance, section, item or part thereof to the vote of the qualified electors for ratification or rejection, either at the next regular municipal election or at a special election as the city council in its discretion may provide." Seattle Charter, article 4.

On the foregoing facts and charter provision, two questions are presented for consideration; first, may a person who signs a petition, such as the referendum petition in this case, withdraw his name therefrom; and second, if so, how long does the right of withdrawal continue. The first question must be answered in the affirmative, for the overwhelming weight of authority sustains the right of withdrawal in such cases. The rule has been applied to withdrawals from petitions for the sale of intoxicating liquors, petitions for changing or removing county seats, petitions for the organization of turnpike companies, petitions for the establishment of public roads, petitions for public improvements, petitions for the issuance and sale of bonds, petitions for local option elec-

tions, and by this court, to a petition for the disincorporation of a town. *Green v. Smith*, 111 Iowa 183, 82 N. W. 448; *Perkins v. Henderson*, 68 Miss. 631, 9 South. 897; *State ex rel. Morgan v. Nemaha County*, 10 Neb. 32, 4 N. W. 373; *Hoffman v. Nelson*, Neb. (Unof.) 215, 95 N. W. 347; *County Court of De Kalb County v. Pogue*, 115 Ill. App. 391; affirmed on appeal, *Kinsloe v. Pogue*, 213 Ill. 302, 72 N. E. 906; *Theurer v. People*, 211 Ill. 296, 71 N. E. 997; *State ex rel. Andrews v. Boyden*, 18 S. D. 388, 100 N. W. 763; *State v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *La Londe v. Board of Supr's of Barron County*, 80 Wis. 380, 49 N. W. 960; *Hord v. Elliott*, 33 Ind. 220; *Hays v. Jones*, 27 Ohio St. 218; *People ex rel. Irwin v. Sawyer*, 52 N. Y. 296; *O'Neal v. Minary*, 125 Ky. 571, 101 S. W. 951; *State v. Kellogg*, 133 Mo. App. 431, 113 S. W. 660; *State ex rel. Kaufman v. Martin* (Nev.), 103 Pac. 840; *Parish v. Collins*, 43 Wash. 392, 86 Pac. 557.

The reason for the rule is well stated in *County Court of De Kalb County v. Pogue, supra*:

"Signatures to such petitions are easily obtained. Ordinary experience teaches that, in matters which do not seem closely to touch themselves, many persons sign petitions without sufficient consideration and inquiry, and if the subject afterwards becomes a matter of public discussion so that their attention is carefully drawn to the reasons for that for which they have petitioned, they often then conclude that they have been hasty in signing, or are in error, or that they do not wish the petition granted. In the case before us, the signatures were purely voluntary. The signers received no consideration for joining in the petition. The petition contained no promise of any kind. The rule governing mutual subscriptions of money is not applicable. One signature was not a consideration for another signature. What good reason is there why one who has changed his mind since signing such a petition, and who concludes that either the public good or his own interest is not in harmony with the petition, may not recede from his signature before action taken thereon? The rule which permits a withdrawal at any time be-

fore final action upon the petition is much more likely to get at the real and mature judgment of the voters, and it is calculated to discourage a hasty presentation of a petition for signatures without a full disclosure of the real merits of the question."

Of the 3,680 electors who signed the original petition in the case before us, 1,739, or almost one-half, withdrew their names, because they had signed the petition under a misapprehension as to the merits of the question involved. This shows the perfunctory ill-advised manner in which the average citizen habitually signs any petition thrust before him, and if the object of the law is to ascertain and carry out the will of the petitioners, public policy should permit and encourage those who have signed through mistake and against their better judgment to withdraw.

But, while the authorities fully sustain the right of withdrawal in such cases, they are practically agreed that the right must be exercised before the jurisdiction of the officer to whom the petition is addressed attaches, or at least before final action on the petition is taken. The respondents concede this, so that it only remains for us to consider whether the sufficiency of the signatures to the petition in question was for the determination of the city comptroller or the city council. If by the former, the withdrawals attempted after the report of the comptroller to the city council came too late, but if by the latter, the withdrawals were timely. An examination of the charter provision convinces us that the determination of that question is to be made by the city comptroller. The charter provides that that officer shall verify the sufficiency of the signatures to the petition, and imposes no duty whatever upon the city council, except to submit the question to the voters for approval or rejection, at a general or special election on the comptroller's report.

A very similar question arose in *Good v. Common Council of San Diego*, 5 Cal. App. 265, 90 Pac. 44, where the supreme court of California was called upon to construe the recall

provisions of the San Diego charter. In answer to the contention now made by the respondents, the court said:

"There is no discretion vested in the common council in connection with the calling of this election. That body's functions are purely ministerial, but, if it be conceded that it was vested with some discretion, it does not follow that it can refuse to act. The duty of determining whether or not the petition contains the proper number of signatures and the comparing of them with the great register devolved upon the city clerk. He is the person given authority to hear and determine the question of sufficiency of the petition, and no appeal therefrom is provided and none apparently intended to be given. This is evident from the provision of the act requiring the return of the petition by the city clerk to the petitioners if found insufficient, and which, in effect, negatives petitioner's right of appeal."

The respondents seek to distinguish that case from the case at bar on the ground that the court was there controlled largely by the charter provision requiring the city clerk to return the petition to the petitioners, if found insufficient, thus showing that the power of determination was vested in the city clerk and not in the common council. But the provision of the Seattle charter relating to the initiative is identical with the recall provision of the San Diego charter, and is very similar to the referendum provision before us. Both the initiative and referendum provisions of the Seattle charter provide that the city comptroller shall verify the sufficiency of the signatures to the petition. True, the former provides that if found insufficient the petition shall be returned to the principal petitioners, who are allowed twenty days additional to complete the petition to the requisite percentage, while the latter contains no provision for a return of the petition in case it is found insufficient. The reason for this difference is obvious. The time for filing petitions under the referendum expires before the comptroller makes his determination and report, and no object could be accomplished by a return of the petition, for its deficiencies cannot be thereafter supplied.

The respondents argue that the petition and the report of the comptroller are in all cases transmitted to the city council, but we do not so read the charter. It certainly contains no express provision to that effect, and the implications are all the other way. After the petition and report have been transmitted to the city council, that body has no duty or discretion in the matter, except to submit the question to a vote at a general or special election. The inference from this is that nothing but a sufficient petition shall be transmitted to the city council. In other words, the comptroller determines the sufficiency of the petition in all cases. An insufficient petition invoking the initiative is returned to the petitioners, in order that they may supply its deficiencies, while an insufficient petition invoking the referendum is *functus officio* and never leaves the comptroller's office. It may be that the action of the comptroller is not final for all purposes. Should he through fraud or mistake fail to report a sufficient petition, or through fraud or mistake report an insufficient petition, the courts would perhaps afford relief in some form, but we are not concerned with that question at this time.

It is further contended that the relator is not entitled to maintain this action, because he has no interest in the question, except as a voter and a petitioner. This question was also decided against the respondents in the *Good* case, *supra*, where the court said:

"By these charter provisions the right to petition for the removal of a public officer is vested in 'the electors entitled to vote for a successor to the incumbent sought to be removed.' This being the foundation of the right, those who are entitled to demand that the common council call the election can certainly maintain the action to protect the right granted. There is but one question, then, as to how the action must be brought. Must all the petitioners join, must one sue on behalf of himself and others, or may one sue alone? We think the authorities sustain the right of one or more of the petitioners to maintain the proceeding for a writ of mandate."

We are therefore of opinion that the action of the city council in refusing to submit the ordinance to the voters for their approval or rejection, and in acting under its provisions, is unwarranted, and the judgment is accordingly reversed, with directions to enter judgment in accordance with the prayer of the complaint.

DUNBAR, PARKER, MOUNT, and CROW, JJ., concur.

[No. 8848. Department One. June 16, 1910.]

SPOKANE GRAIN & FUEL COMPANY *et al.*, *Appellants*, v. MRS. E. V. LYTTAKER *et al.*, *Respondents*.[1]

STATUTES—ENACTMENT—AMENDMENTS — CONSTITUTIONAL RESTRICTIONS—MECHANICS' LIENS. Constitution, art. 2, § 37, providing that no act shall be revised or amended by mere reference to its title, but the act shall be set forth in full as amended, does not apply to an act complete and perfect in itself, although it amends by implication or is a substitute for a section in a former law on the same subject; and hence is not violated by the act of 1909, entitled an act relating to materialmen's liens and the enforcement thereof (Rem. & Bal. Code, § 1133), providing for the service upon the owner of duplicate statements of all materials furnished for the construction of buildings, etc.

STATUTES—TITLE AND SUBJECTS—VETO OF PART—REPEAL DEPENDENT UPON AFFIRMATIVE PART. The governor's powers in the exercise of the veto being limited by the constitutional restrictions upon legislative powers, he cannot veto all the affirmative legislation in an act and approve a section repealing all inconsistent laws, where the repeal was dependent upon the affirmative legislation, and was not included in the title of the act except as connected with the vetoed affirmative sections.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 20, 1910, upon sustaining a demurrer to the complaint, dismissing an action to foreclose materialmen's liens, after a hearing before the court. Affirmed.

[1]Reported in 109 Pac. 316.

Cassius E. Gates and *Martin & Todd*, for appellants.

Herchmer Johnston, for respondents.

RUDKIN, C. J.—This was an action to foreclose materialmen's liens. A demurrer to the complaint was sustained in the court below, and the plaintiffs elected to stand on their pleading and refused to plead further. A judgment of dismissal was thereupon entered, from which this appeal is prosecuted.

The demurrer was sustained for the reason that the complaint failed to allege that, at the time of the delivery of the materials, the lien claimants delivered or mailed to the owner or reputed owner of the property, upon, or about which the materials were to be used, a duplicate statement of all such materials, as required by section 1 of the act of March 4, 1909, Laws of 1909, p. 71 (Rem. & Bal. Code, § 1133). The act in question is entitled, "An act relating to materialmen's liens, and the enforcement thereof," and the body of the act reads as follows:

"Section 1. Every person furnishing material or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, steamer, vessel, boat, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street-railway, wagon road, aqueduct to create hydraulic power, or any other structure or mining claim or stone quarry, shall, at the time such material or supplies are delivered to any person or contractor, deliver or mail to the owner, or reputed owner, of the property, on, upon or about which said materials or supplies are to be used, a duplicate statement of all such materials or supplies delivered to any contractor or person to whom any such materials or supplies have been sold or delivered, and no materialmen's lien shall be filed or enforced unless the provisions of this act have been complied with."

The appellants concede that the demurrer was properly sustained, if this act is constitutional and unrepealed, but they contend, first, that it violates section 37 of article 2 of the state constitution, which declares that, "No act shall ever

be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length;" and, second, that it was repealed by the later act of August 28, 1909, Laws of Special Session, 1909, p. 71. We will first consider the constitutionality of the act, for, if invalid, the question of its repeal becomes immaterial. The mischief against which the above constitutional provision is directed was thus defined by Judge Cooley in *People v. Muhaney*, 13 Mich. 481:

"This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

See, also, *Warren v. Crosby*, 24 Ore. 558, 34 Pac. 661; *Ex parte Pollard*, 40 Ala. 77; *Lockhart v. City of Troy*, 48 Ala. 579; *Gandy v. State*, 86 Ala. 20, 5 South. 420; *State ex rel. Bragg v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *Snyder v. Compton*, 87 Tex. 374, 28 S. W. 1061; *Clark v. Finley*, 93 Tex. 171, 54 S. W. 344; *State ex. rel Farmers' Mut. Ins. Co. v. Moore*, 48 Neb. 870, 67 N. W. 876; *St. Louis etc. R. Co. v. Paul*, 64 Ark. 83, 40 S. W. 705, 62 Am. St. 154, 37 L. R. A. 504; *Evernham v. Hulit*, 45 N. J. L. 53; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714; *Baum v. Raphael*, 57 Cal. 361; *Shields v. Bennett*, 8

W. Va. 74; *King v. Pony Gold Min. Co.*, 24 Mont. 470, 62 Pac. 783; *Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781; *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; *In re Dietrick*, 32 Wash. 471, 73 Pac. 506; *Northern Pac. R. Co. v. Pierce County*, 51 Wash. 12, 97 Pac. 1099, 23 L. R. A. (N. S.) 286; Cooley, Constitutional Limitations, p. 180 *et seq.*

In *Warren v. Crosby, supra*, the court said:

"The question, therefore, to be determined is whether the general act comes within the scope of the constitutional provision invoked. The language of the provision is both prohibitory and mandatory. By its terms it inhibits the revision or amendment of any act by mere reference to its title, and requires that the act revised or section amended shall be inserted at length. It does not purport to limit or restrict the power of the legislature in the enactment of laws. It relates only to the mode or form in which the legislative power shall be exercised. Its prohibition is against legislation effected by modes not in conformity with its requirements. The evil it sought to remedy is the mode in which the legislative power was sometimes exercised in the enactment of revisory or amendatory laws. This evil, as is well known, was the practice of amending or revising laws by additions or other alterations, which, without the presence of the original law, were usually unintelligible. Acts were passed, amending an existing statute by substituting one phrase for another, or by inserting a sentence, or by repealing a sentence, or a part of a sentence, in some portion or section thereof, which, as they stood, often conveyed no meaning, and, without examination and comparison with the original statute, failed to give notice of the changes effected. By such means an opportunity was afforded for incautious and fraudulent legislation, and endless confusion was introduced into the law. Legislators were often deceived, and the public imposed on by such modes of legislation. To prevent these consequences, and to secure a fair and intelligent exercise of the lawmaking power, was the object of the constitutional provision in question. This object it accomplished by imposing a limitation, not on the power of the legislature to make laws, but upon the mode in which that power should be exercised in the enactment of amendatory or revisory laws.

If the act is in itself complete and perfect, and is not amendatory and revisory in its character, it is not interdicted by this provision, although it amends by implication other legislation upon the same subject. Such an act, although it may operate to change or modify prior acts, is not within the mischief designed to be remedied by said section 22."

In *Ex parte Pollard, supra*, the court said:

"It was never intended by the constitution that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length. If this were so, it would be impossible to legislate. The constitutional provision reaches those cases where the act is strictly amendatory or revisory in its character. Its prohibition is directed against the practice of amending or revising laws by additions or other alterations, which without the presence of the original are usually unintelligible. If a law is in itself complete and intelligible, and original in form, it does not fall within the meaning and spirit of the constitution."

In *State ex rel. Bragg v. Rogers, supra*, the court said:

"All the purposes of the present act could doubtless have been accomplished by an act strictly and in form amendatory—by setting out the existing statutes, amending and re-enacting them, but it is obvious the amendatory act would have been cumbersome, and not more intelligible than is the present act. Whether an amendatory act, or an original act should be employed, was matter of legislative judgment and discretion, which the courts cannot control."

In *Snyder v. Compton, supra*, the court said:

"It is not meant by this provision that every act which amends the statutory law shall set out at length the entire law as amended. Under such a rule legislation would in many instances be impracticable. This is especially the case in this state, where the existence of the common law is due to statutory enactment. The practice which it was the purpose of the provision in question to prohibit was that of amending a statute by referring to its title, and by providing that it should be amended by adding to or striking out certain words, or by omitting certain language, and inserting in lieu thereof certain other words. It was not intended to pro-

hibit the passage of a law which declared fully its provisions without direct reference to any other act, although its effect should be to enlarge or restrict the operation of some other statutes."

In *St. Louis etc. R. Co. v. Paul, supra,* the court said:

"Appellants deny that the legislature has the power to amend their charters, except by enacting and publishing at length so much thereof as is amended. This contention is based on a section of the constitution which provides that 'no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended or extended or conferred, shall be enacted and published at length.' But it is not correct. It is well settled in this and other states, where such constitutional limitations are in force, that a statute repeals, or operates as an amendment of, a prior law on the same subject, to the extent that they are in conflict, although the latter is not mentioned in the former."

In *King v. Pony Gold Min. Co., supra,* the court said:

"The act of 1893 does not purport to be an amendment to or a revision of section 540, *supra;* it is an additional and independent piece of legislation, which impliedly amended, and hence repealed, so much of section 540 as is in conflict with it, leaving section 540 otherwise operative."

In *Parker-Washington Co. v. Kansas City, supra,* the court said:

"It is argued that the act of 1905 amends various specific sections of the statute relating to cities of the first class, the language of which is closely followed in the corresponding sections of the new act, only such alterations being made as are necessary to accomplish the object already indicated—a change in the method of paying for public improvements in cities having a population of over 50,000; that the new act contains no reference to the old one, does not accomplish its repeal, and is therefore within the letter and spirit of the prohibition quoted. It is needless at this time to go into a discussion of the purpose and effect of the provision of the constitution referred to. That it has no application to amendments by implication is well settled. . . . The act

of 1905 in a sense amends various sections of the earlier act, but it does so by implication; it does not cover their entire subject-matter and hence does not supersede them, but merely restricts the field of their operation; it is a complete and in a sense an independent enactment, which requires no reference to any other statute to make its meaning clear. The objection made to it in this respect is therefore not well taken."

It seems to us the foregoing authorities demonstrate that the act in question is not violative of the constitutional provision under consideration. Nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication, and as said by the court in *Ex parte Pollard, supra*, "Whether an amendatory or an original act should be employed is a matter of legislative judgment and discretion which the courts cannot control." The purpose of the constitutional provision was to protect the members of the legislature and the public against fraud and deception; not to trammel or hamper the legislature in the enactment of laws. If the act in question were entitled an act to amend the lien laws of the state, by proper reference, its validity could not be called in question, yet, what additional information would such a title or such an act bring home to either the legislature or the public. True, such an amendment would direct attention to the existing laws on the subject, but such was not the object or purpose of the framers of the constitution. So long as a legislative act is complete in itself, and has a sufficient title, it satisfies the requirements of the constitution, whether it contains much or little. The legislature may embody all legislation relating to a given subject in a single act, or it may cover the subject by a succession of acts. This is entirely a matter of legislative discretion over which we can assume no control.

In *State v. Gerhardt, supra*, the supreme court of Indiana collated a long list of statutes of that state which would be violative of the constitution, if construed according to the appellants' contention here, and no doubt an equally long

list might be selected from our own session laws. Many acts of a general nature relating to municipal corporations and kindred subjects change and modify existing laws and charter provisions by implication, but such amendments have never been deemed violative of the constitution. *People v. Mahaney* and *Warren v. Crosby, supra.*

The appellants rely largely on the case of *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769, and it must be conceded that their contention finds support in that decision. It was there held that the act of 1897 (Laws 1897, p. 93, relating to exemptions of personal property was amendatory of section 486 of Hill's Statutes and Codes (Rem. & Bal. Code, § 563), and was therefore void, because not enacted according to the requirements of the constitution. If the act of 1897 was strictly amendatory in its character, the conclusion of the court was unavoidable, but the legislature in its wisdom did not see fit to enact it in that form, and it may well be doubted whether the court did not go too far in limiting and restricting the legislature as to the mode it might pursue in the enactment of laws. *Lockhart v. City of Troy, supra.*

In the course of its opinion in the case cited this court said:

"In construing similar constitutional provisions the courts seem generally to have held that this requirement does not apply to supplemental acts not in any way modifying or altering the original act, nor to those merely adding sections to an existing act, nor to acts complete in themselves, not purporting to be amendatory, but which by implication amends other legislation on the same subject."

The rule there stated is no doubt the correct one, but was not the act of 1897 a supplementary act within the meaning of that rule? It in no wise altered or amended existing laws, but simply increased the existing exemptions, by adding a new exemption of a different kind. The decision in *Copland v. Pirie* was controlled largely by the decision of the United States district court for this district, in *In re Beulow*, 98

Fed. 86, construing the same statute. That court proceeded upon the theory that "The new act is not complete, but refers to a prior statute, which is changed, but not repealed by the new act, so that the full declaration of the legislative will on the subject can only be ascertained by reading both statutes, the very obscurity and the tendency to confusion will be found which constitutes the vice prohibited by this section of the constitution." But how often must we look to two or more acts to ascertain the full declaration of the legislative will. No one will for a moment doubt the power of the legislature to exempt homesteads by one act, household goods by another, farming implements by a third, and so on; yet the full declaration of the legislative will on the subject of exemptions could only be gathered by referring to these several acts. Followed to its logical conclusion, this argument would compel the legislature to embody in a single enactment, or in amendments thereto, all legislation relating to a single subject. Such was not the object or purpose of the provision in question. So long as a legislative act is complete in itself and does not tend to mislead or deceive, it is not violative of the constitution.

Turning now to the act before us, we find it complete in every detail. No person of ordinary intelligence can mistake its meaning. We know full well what the legislature intended, without referring to any other act or statute. Of course it does not embody the entire lien law of the state, but the constitution does not require that it should. We are therefore of opinion that the act is valid, and that the demurrer was properly sustained, unless the act was repealed by subsequent legislation, a question we will next consider.

At the special session of 1909 an act was passed similar in many respects to the act of March 4, 1909 (Rem. & Bal. Code, § 1133). In general terms the first four sections of the latter act required the lien claimant, at or before the delivery of supplies or materials, to mail or deliver to the owner, or to certain designated persons for him, a written

notice, stating that materials and supplies have been delivered or ordered for use on his property, and that a lien may be claimed therefor. The 5th section of the act repeals the act of March 4, 1909 *supra*, and the 6th section declares an emergency. The governor vetoed the first four sections of the act and approved the last two, so that the act as approved by the governor reads as follows:

"An act relating to materialmen's liens and the enforcement thereof, and declaring an emergency.

"Be it enacted by the legislature of the state of Washington:

"Sec. 5. Chapter 45, found on pages 71 and 72 of Laws 1909, be and the same is hereby repealed.

"Sec. 6. An emergency exists, and this act shall take effect immediately." Laws of Extraordinary Session, 1909, page 71.

In approving and disapproving laws, in the exercise of his constitutional prerogative, the executive is a component part of the legislature, and his powers are limited and defined by the constitution. In the exercise of the veto power the executive can have no greater power than the executive and the legislature combined, yet if the legislature had enacted the law in question, in the form in which it left the executive office, there could be no question as to its invalidity. It is now a repealing law pure and simple, and its only object is not expressed in its title, as required by section 19 of article 2 of the state constitution.

"We do not wish to be understood as saying that it is necessary in all cases that the repeal of a given statute should be expressed *in terms* in the title. If the subject of a statute is to repeal another statute, then manifestly that subject must be fairly expressed in the title. If, however, the repealing act is upon the same subject as the act repealed, the repeal is properly connected with the subject-matter and the repealing section is valid notwithstanding the title is silent on that subject." *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522.

As originally passed, the provision repealing inconsistent laws was connected with the subject-matter of the act and properly within the title, but all affirmative legislation was wiped out by the veto, and the repealing clause was left standing alone. The repealing clause was a mere incident to the affirmative legislation contained in the act, and when the latter fell under the veto the former fell with it. In other words, when the executive approved the repealing section he approved something that his veto had already destroyed. The legislature attempted to substitute one act for another and the executive had a right to place his veto on the substitution, but he could not defeat the one act by his veto, and the other by approving the repealing clause.

We are therefore of opinion that the attempted repeal of the act of March 4, 1909, is a nullity, and the judgment of the court below is accordingly affirmed.

GOSE, FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8577. Department Two. June 17, 1910.]

JOHN FORRESTER, *Appellant*, v. RELIABLE TRANSFER COMPANY, *Respondent*.[1]

LANDLORD AND TENANT—LEASE—VALIDITY—ACKNOWLEDGMENT. Under Rem. & Bal. Code, § 8802, requiring leases for more than one year to be acknowledged, the acknowledgment which is essential to the validity of a lease is that of the lessor, although the statute does not so provide in terms; and a lease acknowledged only by the lessee is void.

LANDLORD AND TENANT—LEASES—ACKNOWLEDGMENT. Rem. & Bal. Code, § 8802, providing that a lease of real estate for more than one year without acknowledgment is not valid, goes to the validity of the lease, and not to the prerequisites for recording it.

ACKNOWLEDGMENTS—FORM. Rem. & Bal. Code, § 8759, providing the manner in which acknowledgments shall be taken, applies to acknowledgments taken in this state.

[1]Reported in 109 Pac. 312.

ACKNOWLEDGMENTS—EVIDENCE OF—PAROL EVIDENCE—REFORMATION OF LEASE. The acknowledgment of instruments required by statute to be acknowledged cannot be proved by parol, nor by any evidence other than the certificate of an officer authorized to take acknowledgments, written or annexed thereto; hence a lease not acknowledged on its face cannot be reformed to show that it was in fact acknowledged.

FRAUDS, STATUTE OF—PART PERFORMANCE—UNACKNOWLEDGED LEASE —VALIDITY. An unacknowledged lease for more than one year becomes binding upon the lessee so as to entitle the lessor to recover damages as upon a valid lease, where the lessor, in consideration of the agreement to pay rent for the full five-year term, made improvements not beneficial to the estate, for the sole use and benefit of the lessee, who took possession and performed the lease for two years, during which time the lessor made further expenditures for the same purposes.

Appeal from a judgment of the superior court for King county, Main, J., entered December 30, 1909, dismissing an action to reform a lease and for damages, upon sustaining an objection to the introduction of any evidence. Reversed.

John H. Allen, for appellant.

O. L. Willett, *Frank Oleson*, and *P. W. Willett*, for respondent.

PARKER, J.—When this case was about to proceed to trial in the superior court, counsel for the defendant objected to the admission of any evidence in behalf of the plaintiff upon the ground that the facts alleged in his amended complaint did not entitle him to any relief. The court sustained the objection, treating it as a demurrer, and plaintiff electing to stand upon his amended complaint and not plead further, the court entered an order dismissing the cause. From this ruling and order, plaintiff has appealed.

The allegations and prayer of the amended complaint, so far as we deem it necessary to notice them, are as follows:

"(2) That on the 26th day of June, 1907, the plaintiff being then and there the lessee of and in possession of lot 4, block 320 of Seattle tide lands, made and entered into a certain agreement of contract of lease wherein and whereby the

said plaintiff agreed to and did lease to the said defendant, a corporation, the east one-half of the two-story and basement stable then in course of construction upon said property, for the period of five (5) years from the 1st day of August, 1907, at the monthly rental of one hundred eighty ($180) dollars per month, which said contract of lease was duly and properly executed and acknowledged by each of the parties to said lease before the same notary, at the same time, and thereafter on the 8th day of July, 1907, the said lease was recorded by each of the parties thereto, and ever since has been, and now is of record in the auditor's office in King county, Washington, a copy of said lease being hereto annexed, marked Exhibit 'A' and made a part hereof.

"(3) That at the time of the execution and delivery of said contract of lease and the acknowledgment of same by the defendant thereto, the said lease was also acknowledged in the presence of the said lessee by this plaintiff then and there appearing before the same notary and acknowledged it as his act and deed. . . .

"(4) That acting and relying solely upon the promise and agreement of the said defendant to occupy said premises and to lease the same from the plaintiff herein for the space of five (5) years under the terms and conditions in said instrument set forth, the plaintiff, at the particular instance and request of said defendant, and as a part of the consideration passing to the said defendant to the making of said lease for a space of five (5) years as aforesaid, expended large sums of money in fitting up said premises and in preparing the same for the particular use and occupancy thereof desired by the lessee, which said expenditure and change and plans of building were made at the special instance and request of the said defendant, and under his plans and specifications and solely because of the aforesaid agreement upon behalf of the said defendant that he would occupy said premises for the space of five (5) years as in said contract of lease set forth. All of which facts were well known to the said defendant at said time, and ever since has been and now are well known to it. Said defendant well knowing that the said expenditures were not an improvement upon the said property and were not a benefit thereto, but were made solely for the benefit of the said defendant and as a part of the consideration passing to the said defendant for entering into the contract aforesaid, and was made by the said plaintiff relying solely upon the

fact that the said defendant would occupy said premises for the space of five (5) years at the monthly rental of one hundred eighty ($180) dollars per month.

"(5) That the said defendant entered into possession of said premises under and by virtue of the terms of said agreement on the first day of August, 1907, and at repeated times thereafter the plaintiff paid to the said defendant at its instance and request, and relying solely upon the fact that the said defendant would occupy said premises for the space of five (5) years, various and sundry sums of money to be expended by said defendant in making alterations and repairs to said building as defendant might desire for its particular use and benefit.

"(6) That the said sums so spent aggregate approximately the sum of seven hundred fifty dollars ($750), which said sum was spent by the plaintiff for the particular use and benefit of the said defendant and at its particular instance and request, and was spent by the plaintiff solely because of his reliance upon the contract of the said defendant theretofore entered into by the parties hereto to occupy the said premises for the space of five (5) years at the monthly rental therein set forth. And the said defendant well knowing said fact accepted said lease and went into possession of said premises, and said expenditures were of no value to the estate of said plaintiff, but inured wholly to the benefit of the defendant corporation, and by reason of which facts the said defendant is estopped from denying the invalidity, if any such there be, to his contract of lease as aforesaid.

"(7) That on about the first day of August, 1907, the defendant entered into possession of the said premises in accordance with the terms and conditions in said lease set forth, and ever since said date and up to, on or about the first day of May, 1909, occupied said premises under the terms and conditions in said lease set forth. . . .

"(9) That the plaintiff has at all times and in all manner performed the covenants and conditions upon his part to be performed as set forth in said contract of lease.

"(10) That on said last mentioned date, to wit, the first day of May, 1909, the defendant vacated and abandoned said premises and the whole thereof, and ever since said date has failed, neglected and refused, and still fails, neglects and refuses to pay the said rental to the plaintiff or any portion thereof, though demanded so to do. . . .

"(14) That under and by virtue of the terms of said agreement the lessee therein, The Reliable Transfer Company undertook and agreed to keep said premises in good repair and to deliver up the same at the expiration of the lease in as good condition as when received, reasonable use and wear and loss by fire and other elements excepted, and that the said defendant has failed and neglected to carry out the terms of said lease, but, on the contrary, has greatly damaged said premises in the sum of seven hundred dollars ($700).

"(15) That the plaintiff has been unable to, and still is unable to, lease said premises aforesaid, although he has made diligent effort so to do, and that if the said defendants are permitted to vacate said premises and to fail to carry out the terms of said contract, the plaintiff herein will be greatly and irreparably damaged.

"Wherefore, plaintiff prays for a decree of this court.

"(1) For a decree that the said lease herein set out was acknowledged by each of the parties thereto on the date mentioned in the certificate of acknowledgment attached to said lease, and that said lease be reformed and said certificate be corrected to show such fact.

"(2) For the decree of the court directing the said defendant to carry out the terms and conditions of its said contract with the plaintiff, and upon failure so to do that the plaintiff have judgment against the said defendant for the sum of $7,020, and for the further sum of $700 damages to said premises."

Attached to the complaint is a copy of the lease containing provisions the substance of which are as alleged in paragraphs 2 and 14 above quoted. The lease is signed by both appellant and respondent. There is attached to the lease a certificate of a notary showing acknowledgment of its execution by the respondent, but there is not attached thereto any certificate showing acknowledgment of its execution by appellant.

The contentions of learned counsel for the respective parties involve the validity of this lease or rather the enforcement of rights claimed under its terms, in view of the statute requiring such a lease to be acknowledged; and present for

our consideration two principal questions: (1) Do the facts alleged entitle appellant to a decree establishing the acknowledgment of the execution of the lease by appellant; and (2), do the facts alleged as to performance of acts by the parties referable to the terms of the lease, entitle appellant to the relief prayed for in the nature of specific performance or damages? We will notice these in order.

Under the provisions of section 8802, Rem. & Bal. Code, this court has held that a lease of real property without acknowledgment is not valid, even as between the parties, for any term exceeding one year. *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Koschnitzky v. Hammond Lumber Co.*, 57 Wash. 320, 106 Pac. 900. We have noticed that the lease here involved, has no certificate showing acknowledgment of its execution by appellant, the lessor, though its acknowledgment by the respondent, the lessee, is so shown. We think this does not show such an acknowledgment as is contemplated by the statute, though learned counsel for appellant suggests that the statute does not provide in terms as to who shall acknowledge its execution; but clearly such acknowledgment must be made, in any event, by the lessor, before it can be held to meet the requirements of the statute.

So we have here a lease without official written evidence of acknowledgment, and an attempt to prove acknowledgment of its execution by parol evidence or other evidence than a certificate of a legally authorized officer. Can such acknowledgment be so proven? We will dispose of this question without regard to the rights that appellant may have under the terms of the lease by reason of his performance of acts referable thereto. It is to be remembered that the statutory requirement as to acknowledgment is a requirement affecting the validity of the lease, and is not a mere prerequisite entitling it to public record as in many states is the only office or purpose of an acknowledgment. Section 8759, Rem. & Bal. Code, provides for evidencing acknowledgment by certificate as follows:

"The person or officer taking such acknowledgment shall certify the same by a certificate written on or annexed to said mortgage, deed, or instrument, which certificate shall be under his official seal, if any he has, and such certificate shall recite in substance that the deed, mortgage, or instrument was acknowledged by the person or persons whose name or names are signed thereto as grantor or principal before him as such officer, with the date of such acknowledgment."

While this section is immediately preceded by a section relating exclusively to foreign acknowledgment, and it might therefore be argued that the section has reference only to such acknowledgments, it is a part of the Code of 1881 and is also preceded therein in the same chapter by provisions relating to the execution and acknowledgment of instruments conveying interest in and evidencing encumbrance upon real property. In the case of *Kley v. Geiger*, 4 Wash. 484, 487, 30 Pac. 727, the court cited this section as applying to an acknowledgment taken in this state. Sections 8761 and 8761½ of Rem. & Bal. Code give forms for certificates of acknowledgment which are there declared to be sufficient. In the case of *Rogers v. Pell*, 154 N. Y. 518, 529, 49 N. E. 75, it is held that a statutory requirement that the execution of an instrument shall be acknowledged contemplates the evidencing of such acknowledgment by certificate of a proper officer, even though there be no specific statutory provisions requiring the acknowledgment to be so evidenced. The court observed at page 528:

"The position that, since the change in the statute, an oral acknowledgment without certification is sufficient, we regard as unsound, for the law knows no 'acknowledgment,' made before a magistrate or notary, unless it is certified. The word, as commonly used by the legislature, the courts and the bar, means both the act and the written evidence thereof made by the officer."

We therefore think it is plain that our law requires acknowledgment of the execution of such instruments to be evidenced by certificate of the officer taking the same, and

written upon or annexed to the instrument. It is also to be remembered that such instruments are not now as formerly required to be witnessed. Code of 1881, §§ 2311, 2312; Rem. & Bal. Code, §§ 8745, 8746. This fact would seem to enhance the importance of the certificate of acknowledgment, for it now remains as the only official authentication of the execution of the instrument required by our law. In 1 Cyc. 616, the rule as to the admissibility of parol or other proof than the certificate, to prove acknowledgment of the execution of an instrument, is stated as follows:

"It is the general rule that the official certificate is the only competent evidence of the fact of acknowledgment; and where such certificate is defective in a matter of substance, evidence *aliunde* is not admissible to show that the statute was in fact complied with, and that the officer, through mistake, failed to certify the acknowledgment correctly. If such evidence were allowed to supply a material part of the certificate, then logically it would be admissible to supply an entire certificate, and the acknowledgment might therefore rest in parol."

As we proceed let us remember that we are not here concerned with a certificate of acknowledgment which is merely defective in form or substance. We are dealing with a problem involving the entire absence of any certificate having any reference whatever to the execution of this lease by appellant, the lessor. It is a matter of proving the acknowledgment absolutely unaided by any certificate.

In the case of *Hayden v. Westcott*, 11 Conn. 129, the court said:

"The statute requires that all deeds of land shall be acknowledged; and the only question is, how the acknowledgment shall be evidenced; because it is obvious, that if parol evidence may be introduced, to aid a defective certificate, on the same principle it may be introduced to supply one. The acknowledgment may rest in parol, and the certificate of the magistrate may be entirely dispensed with. The claim now made, inevitably leads to this conclusion. It can only be necessary to observe, that such a claim is opposed to the uni-

form course of practice, to the spirit and meaning of the statute, and to the authority of adjudged cases."

In the comparatively recent case of *Solt v. Anderson*, 71 Neb. 826, 99 N. W. 678, the court observed:

"Running through all the cases will be found a strong feeling against the admission of parol evidence to show the due execution of instruments affecting the title to real estate. The present case shows that such feeling is not unreasonable, and that sound considerations of public policy demand that, where an acknowledgment is necessary to give effect to an instrument, the evidence of the fact of such acknowledgment shall be preserved in a permanent form, and not left to the memory of living witnesses. In this instance, after the lapse of ten years, witnesses took the stand and testified to the exact legal phraseology used by the parties in acknowledging the deed; other witnesses were quite clear that no such language was used. Human memory should not be put to such a strain, nor land titles left to rest on so uncertain ground."

This was said in a case where there was no certificate, and the acknowledgment was attempted to be proved by parol.

In the case of *Cox v. Holcomb*, 87 Ala. 589, 6 South. 309, 13 Am. St. 79, dealing with the question of the power of a court of equity to reform a certificate of acknowledgment, the court said:

"We have been referred by counsel to decisions in other states, which uphold proceedings to correct defective official certificates in analogous cases. An examination shows that the decisions are rested on local statutes authorizing such proceedings; and some of the cases concede that, in the absence of statutory authority, the court would not assume to correct them. *Johnson v. Taylor*, 60 Tex. 360; *Hutchinson v. Ainsworth*, 63 Cal. 286; *Koltenbrocck v. Cracraft*, 36 Ohio St. 584. As we have said, the officer's certificate of acknowledgment, in substantial compliance with the statutory form, is as essential to a valid alienation of the homestead, as the examination and acknowledgment of the wife required by the statute. A substantial compliance must affirmatively appear from the certificate itself, which is the sole and exclusive evidence of the voluntary signature and assent of the wife. Parol evidence is inadmissible to supply

deficiencies. It is manifest from the frame and prayer of the bill, that its purpose is to aid or supply the defective execution of the officer's certificate attached to the deed to complainant. The power of the officer to make such certificate is also statutory. Though a court of equity will relieve against the defective execution of a power created by a party, it is well settled that, with few exceptions, it cannot relieve against the defective execution of a power created by statute, nor supply any of the formalities requisite to its due execution. *McBryde v. Wilkinson*, 29 Ala. 662."

See, also, 1 Enc. L. & P. 876; *Russell v. Rumsey*, 35 Ill. 362; *McKellar v. Peck*, 39 Tex. 381; *McClure v. McClurg*, 53 Mo. 173; *Willis v. Gattman*, 53 Miss. 721; *Jamison v. Jamison*, 3 Wharton (Pa.) 457, 31 Am. Dec. 536; *First Nat. Bank of Harrisonburg v. Paul*, 75 Va. 594, 40 Am. Rep. 740. We are of the opinion that the acknowledgment of the execution of the lease here involved cannot be proved by parol, nor by other evidence than the certificate of an officer authorized to take acknowledgments written upon or annexed to the lease. It follows that we must regard this lease as unacknowledged.

We will now proceed to discuss the other branch of the case. It does not necessarily follow, from our conclusions as to lack of acknowledgment of the execution of the lease, that the appellant is thereby deprived of his right to relief in the nature of specific performance or damages as prayed for, upon the ground that the parties are now bound by the terms of the lease by reason of performance of acts referable thereto. This court has heretofore held that there may be such performance of acts referable to a lease contract that its terms will be enforced as though it had been executed with all the formalities prescribed by statute, the same as rights under an informally executed deed will be protected under like circumstances. *McGlauflin v. Holman*, 1 Wash. 239, 24 Pac. 439; *Schulte v. Schering*, 2 Wash. 127, 26 Pac. 78; *Schulte v. Littlejohn*, 2 Wash. 129, 26 Pac. 79; *Northcraft v. Blumauer*, 53 Wash. 243, 101 Pac. 871; *Koschnitzky v.*

Hammond Lumber Co., supra. These cases involved both unacknowledged and oral leases. All were for terms for more than one year, and hence, did not comply with the statute in their execution, yet their provisions were given full force and effect because of the performance of acts with reference to and in the belief that they were binding contracts between the parties.

In each of these cases, it is true, it was the lessee who had performed the acts and was relying thereon to enforce rights under the lease and retain or recover possession of the leased premises; but we see no reason why the same principal may not be invoked by a lessor who has at large expense prepared the premises for the special benefit of the lessee solely because of and in reliance upon the lease contract, such expenditures being of no value to the estate but wholly of benefit to the lessee. By the allegations of this complaint it appears, that the lease is in due form save as to acknowledgment; that it is certain and specific in its terms; that respondent, the lessor, went into possession under the lease on August 1, 1907, the day of the commencement of the term as provided in the lease, and continued in possession until May 1, 1909; that after the signing of the lease by both parties, the appellant paid to respondent sums of money at repeated times aggregating approximately $750 to be expended by respondent in making alterations and repairs to the building as it might desire for its particular use and benefit; that such expenditures were of no value to the estate but inured wholly to the benefit of respondent; that respondent vacated the premises, and has since such vacation refused to pay rent and refuses to carry out the terms of the lease; and that respondent has damaged the premises in the sum of $700. These facts, it seems to us, would entitle appellant to have the lease decreed to be a valid and binding lease between the parties, and upon refusal of respondent to carry out its terms, appellant would be entitled to damages.

The case of *Dorman v. Plowman*, 41 Wash. 477, 83 Pac.

822, is principally relied upon by learned counsel for respondent, so far as the decisions of this court are concerned. That case, however, did not involve performance of any acts referable to the lease other than the mere entering into possession and the payment of rent while in possession, and when the lessor gave notice of the termination of the term at the end of the first year, one year being the rental period, the whole term being four years, the lessee was not even in possession of the land. This left the case to be determined solely upon the question of the legality of the lease without an acknowledgment of the execution thereof. We think that case is not controlling here.

Our conclusions upon the questions last discussed would alone result in the reversal of the trial court's order, but if appellant should fail upon the trial in sustaining the allegations of his complaint, aside from the allegations relating to acknowledgment of the lease, then the trial court would be called upon to pass upon the question of proving the acknowledgment by parol, so we have deemed it our duty to consider both questions.

The ruling and order of the learned trial court sustaining respondent's objections and dismissing the case is reversed, with directions to take such further proceedings in the cause as are not inconsistent with this opinion.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8732. Department One. June 18, 1910.]

SEATTLE BREWING & MALTING COMPANY, *Respondent*, v. JAMES DONOFRIO *et al.*, *Appellants*, ANTONIO SACCO *et al.*, *Defendants*.[1]

FRAUDULENT CONVEYANCES — ACTIONS — JUDGMENTS — LIEN. An action by judgment creditors to set aside a fraudulent conveyance cannot be maintained after the judgment has become dormant and the lien has expired.

JUDGMENT—LIEN—DURATION—STATUTES—IMPLIED REPEAL. Section 1 of the act of 1893, Rem. & Bal. Code, § 445, providing that the lien of a judgment shall continue for five years from the date of rendition, and Rem. & Bal. Code, § 458, providing that in case of appeal to the supreme court the date of the final judgment in the supreme court shall be the time from which said five years shall commence to run, are impliedly repealed by the act of 1897, Rem. & Bal. Code, §§ 459-461, providing that after the expiration of six years from the rendition of any judgment, it shall cease to be a lien and shall not be extended or continued in force for a period longer than six years from the date of the entry of the "original" judgment; the original judgment being that of the trial court in case of an appeal to the supreme court.

JUDGMENT—LIEN—DURATION—STATUTES—VALIDITY. The act of 1897, Rem. & Bal. Code, §§ 459, 460, 461, limiting the lien of the judgment to six years from its date, and providing that no action can be had upon a judgment after the judgment lien has expired, is constitutional as to limiting the time for the commencement and duration of the lien of judgments upon contracts subsequently arising.

Appeal from a judgment of the superior court for King county, Main, J., entered October 23, 1909, in favor of the plaintiff, after a trial on the merits before the court, in an action to vacate a deed and to subject property described therein to the satisfaction of a judgment. Reversed.

Blake & Williams, for appellants.

E. M. Carr and *Edgar C. Snyder*, for respondent.

[1]Reported in 109 Pac. 335.

RUDKIN, C. J.—On the 3d day of February, 1903, a judgment was entered in the superior court of King county in favor of the plaintiff in this action, and against the defendant James Donofrio, for the sum of $488. The judgment thus entered was affirmed by this court on appeal on the 5th day of January, 1904, and the record was thereafter remitted to the superior court. *Seattle Brewing & Malting Co. v. Donofrio*, 34 Wash. 18, 74 Pac. 823. The present action was instituted some time during the month of April, 1909, the exact date not appearing, to set aside a certain conveyance of real property made by the Donofrios to their codefendants on the 22d day of January, 1903. The plaintiff had judgment according to the prayer of its complaint and the defendants have appealed.

The foregoing facts, and others not deemed material, were stipulated by the parties, and under the stipulated facts the appellants contend that the judgment of February 3, 1903, was dormant at the time of the commencement of this action, and that the action to set aside the fraudulent conveyance was not commenced within the time limited by law. It is conceded by all parties concerned that if the judgment of February 3, 1903, was dormant at the time of the commencement of this action, the judgment of the court below is erroneous and must be reversed; and such is manifestly the case, for a judgment or other lien is a necessary prerequisite to an action of this kind. Section 1 of the act of March 3, 1893, Laws of 1893, p. 65, Rem. & Bal. Code, § 445, provides that,

"The real estate of any judgment debtor and such as he may acquire, shall be held and bound to satisfy any judgment of the district or circuit court of the United States, if rendered in this state, or of the superior or supreme court, or any judgment of a justice of the peace for the period of five years from the date on which said judgment was rendered, and such judgments shall be a lien thereupon to commence as follows: Judgments of the superior court of the county in which real estate of the judgment debtor is situ-

ated, from the date of the entry thereof; judgments of the district or circuit courts of the United States, if rendered in this state; judgments of the supreme court; judgments of the superior court of any county other than the county in which said judgment was rendered, and judgments of a justice of the peace, from the time of the filing and indexing of a duly certified transcript or abstract of such judgments, as provided by this chapter, with the county clerk of the county in which said real estate is situated."

Section 322 of the Code of 1881, Rem. & Bal. Code, § 458, provides that:

"An appeal to the supreme court or stay of execution shall not affect any existing lien; and in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run. Personal property shall only be held from the time it is actually levied upon."

Sections 1, 2, and 3 of the act of March 6, 1897, Laws of 1897, p. 52, Rem. & Bal. Code, §§ 459, 460, 461, provide as follows:

"Sec. 1. After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor.

"Sec. 2. No suit, action, or other proceedings shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment.

"Sec. 3. When the lien of any judgment, as specified in section 1, has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act."

If this case is controlled by the provisions of the act of 1893, *supra*, the judgment of February 3, 1903, was dormant at the time of the commencement of this action, for more than five years had elapsed between the date of the affirmance by this court, and the date of the commencement

of the present action. The respondent contends, however, that the case is controlled by the act of 1897, *supra*, and that the lien of its judgment continued for six years from the date of the entry of the original judgment. In so far as the mere duration of the lien is concerned this contention must be sustained. While the act of 1897 does not in express terms create or continue the existence of judgment liens, yet the implication that a judgment lien exists for a period of six years from the date of the entry of the original judgment is plain and unavoidable. Section 1 provides that after the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor; and section 3 provides that, if the lien of any judgment has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act. It is very plain from these provisions that the legislature intended that judgment liens should continue for six years without renewal or revival, and that no action or proceeding of any character would lie to extend the lien beyond that period. But while the duration of the respondent's lien is fixed at six years by the act of 1897, its commencement is fixed by the same act. The act is complete in itself, and fixes not only the duration, but also the commencement of the lien, repealing and superseding all inconsistent laws on the subject. Section 2 of the act provides that the lien shall not be extended or continued in force for a longer period than six years from the date of the entry of the *original judgment*. The date of the entry of the original judgment in this case is the date of the judgment of the superior court, and the present action was not commenced until more than six years from that date. The earlier statute fixing a different date in case of an appeal to the supreme court was repealed by necessary implication by the act of 1897, for the judgment of this court on appeal is in no sense the *original judgment*. Many cases have been

cited from this court, but they have no direct bearing on the question now under consideration.

In *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104; *Denio v. Benham*, 24 Wash. 485, 64 Pac. 749; *Howard v. Ross*, 38 Wash. 627, 80 Pac. 819; *Fischer v. Kittinger*, 39 Wash. 174, 81 Pac. 551, and *Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841, it was held that the act of 1897 was unconstitutional and void as to pre-existing judgments and contracts. In *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831; *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846; *Hardin v. Day*, 29 Wash. 664, 70 Pac. 118; *Hewitt v. Root*, 31 Wash. 312, 71 Pac. 1021, and *Dalgardno v. Barthrop*, 40 Wash. 191, 82 Pac. 285, it was held that an execution or judicial sale made more than five years after the date of the entry of the judgment, without revival or renewal, was void. In the case last cited the judgment was entered after the passage of the act of 1897, but the contract existed prior to its passage. It will thus be seen that the direct question as to the commencement or duration of a lien under the act of 1897 is here presented for the first time, and we see no escape from the conclusion that the lien commences with the entry of the judgment of the superior court and expires at the end of six years from that date. The act is clearly constitutional and valid in so far as it fixes the commencement and duration of judgment liens, but whether it is valid in so far as it attempts to destroy absolutely and forever all obligations arising out of the judgment is a question that is not now before us. Inasmuch, therefore, as the respondent had no lien, by judgment or otherwise, at the time of the commencement of this action, the judgment must be reversed with directions to dismiss the action, and it is so ordered.

GOSE, FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8450. Department One. June 18, 1910.]

Lewis S. Nelson, *Respondent*, v. Sophia J. McPhee, *Appellant*.[1]

Appeal—Record—Review. Where the record on appeal consists of the pleadings, findings, conclusions, and decree, the only question for review is whether the findings support the decree.

Appeal—Review—Findings. In the absence of the evidence it will be presumed sufficient to support a decree, although the findings were defective and incomplete.

Divorce—Decree—Construction—Division of Property. Where the pleadings in a divorce action submitted specified community property to the jurisdiction of the court, praying that an equitable share be apportioned to the wife, a decree, based on findings in favor of the wife, awarding her more than one-half in value of all the property, was intended to set apart such equitable share, and left the balance standing in the husband's name as his share, although not mentioned in the decree, free from any claim of the wife; and the fact that she joined in a mortgage thereof pending appeal is not evidence that she retained an interest therein.

Appeal from a judgment of the superior court for King county, Canfield, J., entered June 24, 1909, upon findings in favor of the plaintiff, in an action to quiet title, after a trial on the merits. Affirmed.

Corwin A. Townsend and *Hastings & Stedman*, for appellant.

Herr, Bayley, Wilson & Smith, for respondent.

Morris, J.—Action to quiet title, decree for plaintiff, and defendant appeals. Respondent alleged ownership of lot 12, block 37, Heirs of Sarah A. Bell's second addition to Seattle, by virtue of mesne conveyances, and prayed to have his title quieted as against appellant. The answer admitted the conveyances pleaded by respondent, denied his ownership, and set forth an ownership in appellant of an undivided one-half interest.

[1]Reported in 109 Pac. 305.

The only record before us consists of the pleadings, findings of fact, conclusions of law, and decree, and hence the only question to be considered on the appeal is whether the findings support the decree. The findings recite that, on January 15, 1889, the appellant was the wife of Jacob Scoland, and that on said day the lot in suit was conveyed to Jacob Scoland; that on May 20, 1891, appellant commenced an action against her then husband, Jacob Scoland, praying for a divorce; that the husband appeared in such action and on September 5 a decree was entered awarding a decree to appellant; that in the complaint in the divorce action appellant alleged the community property of the parties to be a lot on the northwest corner of Lenora and Tenth streets (which is the location of the property in suit), and a property known as 1413 Eighth street; that in addition to the personal property described in the complaint, the court in the divorce action found that the husband had an interest in a towboat, and allotted to the wife the property known as 1413 Eighth street as her separate property for her support and the education of the children of the parties, and found a lot described as lot 6, block 49, second addition of the Heirs of Sarah A. Bell, was the separate property of the wife; that the wife was also allotted the household furniture, and made other allowances; that said decree was appealed from and was on appeal sustained by this court; that there is no mention made in the decree granted the wife of lot 12, block 37, second addition of the Heirs of Sarah A. Bell, nor is there any mention made of the personal property referred to in the findings; that on October 15, 1891, Jacob Scoland and his wife Sophia executed a mortgage on lot 12, which was subsequently satisfied; that on January 19, 1892, the same parties executed a second mortgage to the same mortgagee, upon lot 12, which was also thereafter satisfied; that on October 15, 1892, Jacob Scoland alone executed a mortgage to the same Anna O. Miller, on lot 12, which was thereafter duly satisfied, and that on October 18, 1893, Jacob

Scoland, describing himself as an unmarried man, conveyed lot 12 to Anna O. Miller. The court finds further that there is no estoppel established, nor is a plea of the statute of limitations sustained, nor is there evidence showing ouster, nor demand on the part of respondent, for any money expended by him on account of lot 12. Then follows a conclusion of law, in which the court sets forth its belief that in the divorce action the trial court considered that the property awarded to the wife was an equitable distribution to her from the community property, and that the property not given to the wife was intended to remain the separate property of the husband. The court then further concludes that the respondent is entitled to a decree quieting his title against any claim or interest of appellant, and orders a decree accordingly.

The appellant now contends that these findings do not support the conclusions nor the decree based thereon, for the reason that nowhere in the findings is there any statement of fact justifying the court in concluding that respondent was the owner of lot 12. It is apparent from a mere inspection of the findings as we have recited them that they are extremely meager and incomplete. The court below evidently had the entire record in the divorce proceedings before him, and in the present case, instead of setting forth the findings of fact, conclusions of law, and decree in the divorce case, as his finding of fact, and basing thereon his decree, the court gives by way of findings of fact in this case a summary of his interpretation of what is established and what is not established by the record in the divorce action. The findings being manifestly defective and incomplete, it does not follow that the decree must be reversed. Rather does it follow, as we have uniformly held, that in the absence of the evidence upon which the court below based its findings, we will presume the evidence was sufficient to support the decree. The only way to overcome this presumption is to bring the evidence as well as the findings before us. *Enos v. Wilcox*, 3

Wash. 44, 28 Pac. 364; *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346; *Gay v. Havermale*, 30 Wash. 622, 71 Pac. 190; *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029. This disposes of the suggested error.

We have, however, felt at liberty to examine the record in the divorce case of *Scoland v. Scoland*, 4 Wash. 118, 29 Pac. 930, in view of the opinion therein expressed that "the division of their property was not unfair," for the purpose of ascertaining what that division was, and thus satisfy our minds as to the equity of the decree of the court below, and in view of the fact that in the findings before us the court below, having before it the same record as induced this court on the Scoland appeal to say the division of the property was fair, has not attempted to make any finding of the disposition of the property other than to refer to that which was awarded to the appellant. By the pleadings in the *Scoland* case the following property was submitted to the jurisdiction of the court: House and lot described as 1413 Eighth street, valued at $5,000; the northwest corner of Lenora and Tenth street, which is the lot 12 in question in this action, valued at $2,000, upon which there was a mortgage of $1,680; lot 6, block 49, 2d Add. Heirs of Sarah A. Bell, at 11th and Olive, valued at $2,000; and the following personal property: A one-third interest in the tug Rainier, valued at $3,500, and stock in the Seattle Drydock & Shipbuilding Company of the par value of $1,800. All the above property was conceded to be community property, except lot 6, which the wife claimed the husband had given to her as her separate property about two years prior. The prayer of the wife's complaint was, "That the court will award to her out of the community property her fair and equitable portion thereof." The findings of fact were in favor of the wife, holding lot 6 as her separate property and given to her as such by her husband. The other property was found to be the community property of the parties, and the values fixed as above given. The court then made its decree, based on its conclu-

sions of law which followed the finding, and in the decree the court granted the wife's prayer, and set apart to her what it adjudged to be her equitable portion of the property, viz., lot 6, block 49, the house and lot described as 1413 8th street, all the household furniture, and $250 attorney's fee. Thus it will be seen that the values awarded to the wife amounted to $7,250, not including the furniture, upon which no valuation was placed. The value of the remaining property, less the mortgage on lot 12, was $6,520. It is clear from all these circumstances that the purpose and intent of the decree was to pick out and set apart to the wife her equitable share of the property, leaving the remainder not thus included, all of which was personal property except lot 12 (the title to which was in the husband's name), as the husband's share of the property. This was evidently what this court had in mind when it used this language in its opinion, "the division of the property was not unfair."

It, therefore, appears to us that the conclusion reached by the court below was an equitable one. Some stress is laid by appellant on the fact that, after the divorce, she joined in the first two mortgages, and it is argued that this is evidence of the fact that she was then regarded as having an interest in lot 12. The divorce was granted September 5, 1891, and an appeal taken to this court. That appeal was not decided until April 7, 1892. In the interim the mortgages dated October 15, 1891, and January 19, 1892, had been given. It is clear that, until the decision of the appeal, the parties could not know what their property rights would be, and hence the mortgagee might well have insisted that both join in the execution of the mortgages. It will be noted that, when the third mortgage was given to the same mortgagee, in October, 1892, after the decision of the divorce appeal, the husband alone executed it, as he did the deed in October, 1893; thus evidencing the fact that, after the decision here, the husband at least claimed lot 12 as his own. To our mind this is a strong circumstance in favor of the

respondent, and not a supporting element in the contention of appellant. These considerations lead us to an affirmance of the judgment, and it is so ordered.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

[No. 8638. Department One. June 18, 1910.]

JAMES KIEFER, *substituted for H. A. Halferdahl, Respondent*, v. CARTER CONTRACTING & HAULING COMPANY, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACTS — FORFEITURE — DEFAULT—RESCISSION BY VENDOR. The vendor exercises his option to rescind a contract for the sale of land, and his acts are notice of his intent, where the contract provided for two annual payments, and on failure of the vendee to make the first payment, the vendor mailed written notice of his election to forfeit the contract (which was not received), and later gave verbal notice, and leased the premises to tenants who erected improvements and materially changed the character of the use and possession of the premises.

SAME—FORFEITURE—PREREQUISITES—TENDER. A tender of a deed is not a prerequisite to the vendor's right to declare a forfeiture of contract for the sale of land, where default was made in the first payment to be made, as there were no mutual and dependent covenants as in the case of the last payment.

SPECIFIC PERFORMANCE—RIGHT TO—DEFAULT IN PAYMENT. Equity will not decree a specific performance of a contract to convey land at the suit of a vendee who was in default in making payments, without any excuse for the failure, and time being of the essence of the contract.

Appeal from a judgment of the superior court for King county, Main, J., entered October 29, 1909, upon findings in favor of the plaintiff, in an action for specific performance, after a trial on the merits. Reversed.

Kerr & McCord, Clem J. Whittemore, and *L. V. Newcomb*, for appellant.

James Kiefer, for respondent.

[1]Reported in 109 Pac. 332.

Morris, J.—Appeal from a decree of specific performance. The plaintiff below was H. A. Halferdahl. On motion James Kiefer has been substituted as respondent in this court.

In May, 1907, the defendant and H. V. Perry entered into a contract for the sale and purchase of lots 7 and 8, block 6, D. T. Denny's second addition to North Seattle. The purchase price was fixed at $6,000, to be paid in two installments, $3,000 October 6, 1907, $3,000 October 6, 1908, with interest from date of contract. Time was made the essence. Neither of these installments was paid. The contract was assigned a number of times, and finally was transferred to H. A. Halferdahl, who brought the action October 6, 1908, pleading a waiver of the payment due October 6, 1907, and alleging a prior tender of $6,517, the amount then claimed to be due. Answer was filed, denying the waiver and admitting a tender of $5,000. Upon the trial the court ordered a specific performance of the contract upon payment of the amount found due, and defendant appeals.

The only question to be considered here is appellant's contention that the contract was forfeited. No offer of payment of the first installment was made October 6, 1907, and on October 7 the appellant mailed a written notice of forfeiture to Perry, addressed to him at his Seattle address, with appellant's return card on the envelope. The same was not returned to appellant, but Perry testifies he did not receive the notice, and the court below so found. Some time thereafter appellant made leases of one of the lots to Jahn & Company, who inclosed the lots with a high board fence, and used it for storage purposes. The other lot was leased to McGrath & Duhamel, who erected a substantial one-story building thereon, upon stone piers, which was used for the storage of material used in the constructing of the post-office building at Seattle. It is also shown that appellant has paid taxes and assessments on the two lots, amounting to $177.10, which under the contract Perry assumed. Some time after the notice of forfeiture was mailed to Perry, he

called up the appellant over the 'phone and requested permission to examine an abstract of the property, and was then informed by appellant that, having forfeited his contract, he had no interest in the premises, and his request was denied. Again, two or three weeks prior to October 6, 1908, when by the terms of the contract the second payment was due, Halferdahl, plaintiff below and the then assignee of Perry's interest in the contract, called on Mr. Hall, cashier of the First National Bank, Seattle, and sought to interest Mr. Hall in furnishing money to make the contract payments. Mr. Hall saw appellant in regard to the contract, and was informed that, having declared a forfeiture of the contract, no negotiations for the payments or a deed would be entertained. This was reported to Halferdahl.

It seems clear from all these circumstances that appellant had exercised its election of forfeiture, and that such was the understanding of Perry and Halferdahl. Both written and verbal notice of such election was given. Whenever interviewed by Perry or others representing his interest, appellant maintained its position that the contract had been forfeited. The placing of Jahn & Company and McGrath & Duhamel in possession of the premises, and the character of the improvements erected upon the premises under these leases was in itself notice. It is true that it was understood that, until deed passed, the appellant was permitted to continue in its use of the premises, but the change and character of the possession by Jahn & Company and McGrath & Duhamel was so different from the use and possession exercised by appellant that it must be held as a notice and election on the part of appellant to assume ownership over the premises and forfeit any right given Perry under the contract. If the first payment had been made, then the making of the second payment and the delivery of the deed would be mutual and dependent covenants, and appellant could not declare a forfeiture without a tender of the deed. But this was not the situation at the time the first payment fell due. There

was then no obligation on the part of appellant other than the receipt of the money, and no covenant to be performed before a forfeiture of the contract could be declared because of Perry's default in nonpayment. In any event, we fail to see how respondent had any standing in the court below. He had himself voluntarily broken his contract by failing to make the 1907 payment. His complaint suggests no excuse or justification for such failure, except it be its allegation of waiver, which is not sustained by the evidence. Having broken his contract, he could not make it the basis of a recovery and pray the court to exercise its equitable jurisdiction in ordering appellant to specifically perform a contract which theretofore he had not regarded as of any binding force upon himself.

"It may, then, be laid down as an acknowledged rule in courts of equity . . . that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule appears to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing." *Benedict v. Lynch*, 1 Johns Ch. (N. Y.) 370, 7 Am. Dec. 484.

The same rule has been announced even in cases where time is not made of the essence (*Stewart v. Allen*, 47 Fed. 399; *Taylor v. Longworth*, 39 U. S. 172); especially where, as in the case before us, no equitable reason is shown for the default and noncompliance. It is undoubtedly the correct rule that equity will not enforce a forfeiture until its right has been clearly established, but that does not militate against the equally well established rule that a forfeiture may be declared for a nonexcusable failure to comply with the terms of the contract as to payment, when by its terms, or its equitable interpretation, time is of the essence. *Douglas v. Hanbury*, 56

Wash. 63, 105 Pac. 1110, and cases cited; *Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036.

Respondent urges that, before a forfeiture could be declared, a deed must be tendered, and cites cases from this court where such a rule is announced. Such would be the rule if the covenants were mutual and concurrent, as for instance as we have before referred to, the default was in the last payment only. But such is not the case here, and the tender of the deed is in no sense a condition precedent to the right of forfeiture.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

[No. 8576. Department One. June 18, 1910.]

THE CITY OF SEATTLE, *Respondent*, v. FRANK ATWOOD, *Appellant*.[1]

EMINENT DOMAIN—DAMAGES—MEASURE—IMPROVEMENTS—REMOVAL TO CONTIGUOUS LOTS. In proceedings to condemn a specified lot on which there was located a building, under Rem. & Bal. Code, § 7777, providing that if a building is damaged so that it cannot be readjusted to the premises, the measure of damages for its condemnation shall be its fair market value, damages are not authorized for readjustment of the building to another contiguous lot which was a separate unit, put to a distinct use, and which was not taken or damaged.

SAME—DAMAGES—TO CONTIGUOUS PROPERTY. Rem. & Bal. Code, § 7775, does not authorize an owner in condemnation proceedings to claim damages to a lot contiguous to the lot taken, where the lots were separate and appropriated to distinct uses.

Appeal by defendant from a judgment of the superior court for King county, Ronald, J., entered July 8, 1909, upon an award of damages in a condemnation proceeding, after a trial before the court and a jury. Reversed.

[1]Reported in 109 Pac. 326.

John E. Ryan and *Edwin M. Stanton*, for appellant.

Scott Calhoun and *Howard A. Hanson*, for respondent.

Gose, J.—This is a proceeding to appropriate certain land for park and parkway purposes, and to determine the just compensation to be made therefor. Limited to the questions before us, the petitioner sought to take and damage lot 13, in block 44, in Yesler's third addition to Seattle. The property owner has appealed from a verdict and judgment awarding him damages.

The appellant owns two adjoining lots, 4 and 13, with a house upon each lot. The former abuts on Lakeside avenue, and the latter abuts on Erie avenue. Lot 4 will not touch the proposed boulevard, nor is it included in the property sought to be taken or damaged. The respondent, over the objection of the appellant, was permitted to show that the appellant owned lot 4, and that the building on lot 13 could be readjusted to the part not taken by using a small portion of lot 4. The appellant contends that this was error. We think that, when considered with the verdict of the jury and the instructions of the court, it was clearly so. The court instructed the jury that the appellant "is entitled to have the building readjusted in some manner so as to make it substantially and practically as good as it is now. If the readjustment cannot be done, then he is entitled to have the value of the building if it is a total destruction." This instruction should have been given with specific reference to lot 13. The jury did not expressly find that the building could be readjusted to the remainder of lot 13, but allowed damages for its readjustment. The evidence leaves it exceedingly doubtful whether it can be so readjusted. The statute, Laws 1907, page 319, § 10 (Rem. & Bal. Code, § 7777), provides:

"If the entire building is taken, or if the building is damaged, so that it cannot be readjusted *to the premises*, then

the measure of damages shall be the fair market value of the building. . . ."

The testimony and the instructions should have been confined to the damages to lot 13. The lots were separate units and were put to distinct uses. The respondent did not seek to damage lot 4, nor did the appellant claim damages to that tract. "Contiguous lots improved for separate use are not one tract." 2 Lewis, Eminent Domain (3d ed.), 699. See, also, *Wilcox v. St. Paul & N. P. R. Co.*, 35 Minn. 439, 29 N. W. 148, and *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16. As we said, in *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60.

"The statute goes no further than to require the removal to the part of the particular tract that is not taken, and the public pays the cost of removal."

The respondent contends that the appellant had the right to claim damages to lot 4 under section 8 of the statute to which reference has been made. Rem. & Bal. Code, § 7775. This contention is untenable. As we have seen, the lots were separate and appropriated to distinct uses. The testimony and the instructions of the court should have been limited to damages to lot 13, and to the question as to whether the building could be readjusted to the part of the lot not taken.

The contention that exception was not properly reserved is without merit.

The judgment is reversed.

Rudkin, C. J., Fullerton, Morris, and Chadwick, JJ., concur.

[No. 8607. Department One. June 18, 1910.]

STEVE O'BRIEN *et al.*, *Appellants*, v. W. S. McKELVEY *et al.*, *Respondents*.[1]

EJECTMENT—TITLE—PLEADING—ISSUES AND PROOF. In ejectment it is a good defense to plead title in another with right to possession as his agent and that plaintiff's deed is a forgery, under Rem. & Bal. Code, §§ 793, 794, providing that the defendant in ejectment may set up a legal or equitable defense, that the superior title shall prevail, and that he cannot give in evidence any estate in himself or another or license or right to possession unless pleaded.

EJECTMENT—PARTIES—SUBSTITUTION—PROOF OF TITLE. In ejectment a plaintiff suing the owner's agent in possession cannot complain because the agent did not have his rights protected by substituting the owner as party defendant, since plaintiff, under Rem. & Bal. Code, § 792, had the right to make the owner a party defendant.

EVIDENCE — HANDWRITING — OPINIONS—COMPARISONS—ADMISSIBILITY. Upon an issue as to whether a deed was a forgery, it was error, warranting the grant of a new trial, to exclude evidence of a witness who was familiar with the grantor's handwriting and had examined the disputed signature and believed that it was not genuine, and to exclude a proven signature for comparison by experts who had seen the forgery.

EJECTMENT—EVIDENCE—FORGERY—BURDEN OF PROOF. Upon an issue as to the forgery of a deed in plaintiff's chain of title, it is presumably in his possession, and the opposite party need not produce it or account for its loss in order to admit the evidence of experts who had compared it with proven signatures.

EVIDENCE—COMPARISON WITH LOST SIGNATURE. The fact that a disputed signature is lost does not exclude the testimony of an expert who had compared it with an admitted signature, especially where the opposite party was presumably in possession of the lost writing and did not account for its loss.

Appeal from an order of the superior court for King county, Tallman, J., entered September 27, 1909, granting a new trial, after a trial and judgment in favor of the plaintiffs, in an action of ejectment. Affirmed.

H. E. Foster, for appellants.

Tom Alderson, for respondents.

[1]Reported in 109 Pac. 337.

GOSE, J.—This is a suit for the recovery of the possession of certain lots in South Seattle, and for damages for their wrongful detention. The complaint alleges that the plaintiffs are husband and wife, that the defendants are husband and wife, that the plaintiffs are the owners of the property, and that the defendants, since May, 1908, have wrongfully withheld the possession from them, to their damage in the sum of $250. The separate answer of the defendant husband denies both the plaintiffs' ownership and the wrongful detention, and affirmatively alleges that one Frank Elsholtz is the owner of the property; that in October, 1907, Elsholtz was suffering with tuberculosis of the lungs, and desiring to leave Seattle for the state of California, constituted him, the said defendant, his sole agent, to care for and manage the property, and left it in his care and possession; that the plaintiffs deraign title through a deed purporting to have been executed by Elsholtz to one Lena Vosburg on January 7, 1908, but that Elsholtz did not execute or deliver the deed, and that his signature to the purported deed is a forgery. The defendant wife, for her separate answer, denied that she was in possession, and disclaimed having any interest in the property. The plaintiffs demurred to the affirmative matter in the answer of the defendant husband; the demurrer being overruled, issue was joined by a reply. At the close of the testimony, a judgment was entered in favor of the plaintiffs, adjudging them to be the owners of the property and awarding them damages. Thereafter, on motion of the defendants, a new trial was granted. The plaintiffs have appealed.

The appellants deraign title as follows: A deed from Rainier Investment Company to Frank Elsholtz of date May 25, 1903; a deed from Frank Elsholtz to Lena Vosburg of date January 7, 1908; a deed from Lena Vosburg to Eric Hostland of date January 24, 1908; a deed from Eric Hostland to William J. Dana of same date; a deed from William J. Dana to appellants of date May 6, 1908.

These several conveyances were shown by certified copies of the deeds. This, with parol testimony showing the possession of the respondents and the rental value of the property, constitutes the appellants' claim to a right of recovery. The respondents offered testimony tending to show that the notary who took the acknowledgment of Elsholtz to the purported deed to Vosburg was not acquainted with Elsholtz, but relied on the representation of the parties who appeared before him as to their identity, and that the respondent husband last saw Elsholtz on October 10, 1906, when the latter left his abstracts and papers with him, and gave him charge and possession of the property; that Elsholtz was then very sick with pulmonary consumption, and stated that he was going to the state of California; that he has not since seen him or heard of him; that Elsholtz promised to send money to pay taxes on the property, but did not do so; that he, the respondent, knew Elsholtz's signature, and that the respondents have since had charge of the property. After this testimony had been admitted and while the respondent husband was testifying, the respondents made the following offer:

"I offer to prove by this witness that he is familiar with the signature of Frank Elsholtz who is admitted to be on January 7, 1908, the record owner of the property in dispute; that he is familiar with his signature, and that on or about the 9th day of January, 1908, that this original deed, of which this instrument filed here purported to be a copy, was on file in the auditor's office, and this witness came up and brought this contract with him, and compared this signature of Frank Elsholtz, and analyzed and examined the signature of that deed and declared the signature to be a forgery; and that at that time Mr. George Meager, then working in the auditor's office, and Mr. Peterson at the same time compared this signature here with the signature on that original deed and declared it in their judgment, as familiar with handwriting and as handwriting experts, was not the same as the signature on this contract; and I offer to prove

that the signature on the contract is the original signature of Frank Elsholtz by this witness."

An objection to the admission of this testimony was sustained.

The appellants first contend that the court erred in overruling the demurrer to the new matter in the separate answer of the respondent husband. We cannot assent to this view. Rem. & Bal. Code, § 793, provides that, in suits of this character, the plaintiff shall set forth in his complaint the nature of his title to the property, and the defendant may set up a legal or equitable defense, and that the superior title shall prevail. Section 794 provides that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer." In *Allen v. Higgins*, 9 Wash. 446, 37 Pac. 671, 43 Am. St. 847, and *Garvey v. Garvey*, 52 Wash. 516, 101 Pac. 45, we held that evidence was not admissible to impeach or defeat the plaintiff's title in suits in ejectment, unless the facts were specially pleaded.

The appellants further urge that, if Elsholtz had title to the property which he desired to assert, he could have been substituted as a defendant in the action and had his rights protected, but that he cannot otherwise be considered. The appellants, under the provisions of Rem. & Bal. Code, § 792, had the option to make him a party defendant, but did not do so, and cannot complain. Moreover, as we have seen, under our statute the superior title prevails. It is obvious that the appellants have no title if Elsholtz's signature was forged to the deed, and that their action must fail.

The appellants state that the new trial was granted because the court had rejected the offered testimony. The evidence offered was clearly admissible, and the court was right in granting a new trial. Not only did the respondents offer to show that the witness was familiar with Elsholtz's handwriting, but the witness had testified to that fact. The effect of the

offer was to show that the witness was familiar with Elsholtz's handwriting; that he examined the signature to the original deed, and that it was not genuine; that the witness and two other persons compared the signature to the deed with the signature upon another paper which they offered to prove was Elsholtz's signature, and that the comparison convinced the parties that the signature to the deed was forged. It is the settled law in this state that a witness who has knowledge of the handwriting of another may testify as to his belief or his opinion as to the genuineness of his signature (*Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241), and that handwriting, admitted or proved to be genuine, may be used as a standard for comparison with handwriting claimed to be spurious. *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179. The original deed was presumably in the possession of the appellants. It is a part of their chain of title. When its integrity was assailed, it was their duty to produce it, if demanded, or account for its loss.

"Where the expert has made a comparative study before the trial and the *disputed writing is lost* when the trial occurs, the opponent is deprived of the fullest opportunity of cross-examination; but this should not in itself exclude the testimony, unless there is clear fault, in the party offering the expert, as to the loss." 3 Wigmore, Evidence, § 2012.

It is apparent that there was no duty on the respondents, either to produce the deed or to account for its absence. *Abbott v. Coleman*, 22 Kan. 250, 31 Am. Rep. 186, was a suit upon a promissory note. There was a plea of payment. Defendant, after proof that he had lost the receipt and that his attorney had examined it about a year before the trial, asked the attorney, a witness in the case, to examine the admitted signature of the indorsee of the note, which was in evidence, and state whether the receipt was signed by him. An objection was sustained to the question. This was held to be error. The court said the evidence, whilst weak, was admissible, and that an expert may compare a signature

which he has previously seen, but which is lost, with one which is admitted to be genuine. The same rule is announced in *Koons v. State*, 36 Ohio St. 195; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Hammond v. Wolf*, 78 Iowa 227, 42 N. W. 778, and *Grooms v. State*, 40 Tex. Cr. 319, 50 S. W. 370.

The respondents were entitled to prove and offer in evidence the signature of Elsholtz, and to have their experts, if they could qualify, give their opinion as to whether he had signed the deed, based upon a comparison of his proven signature with their recollection of the signature to the deed. The motion for a new trial was properly granted.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8731. Department One. June 18, 1910.]

EARL MONEY *et al.*, *Respondents*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

NEW TRIAL—SUFFICIENCY OF EVIDENCE—PROVINCE OF COURT. Where there is a substantial conflict in the evidence it is discretionary for the trial court to deny a motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict; and the fair inference from comment of the trial judge to the effect that two juries had believed the plaintiff, that its probative force was for the jury, and that he was compelled to deny a new trial, is that the evidence justified the verdict; especially as the court should be reluctant to grant a new trial for insufficiency of the evidence after two juries had found it sufficient.

APPEAL—REVIEW—DISCRETION—REFUSAL OF NEW TRIAL. The supreme court cannot reverse a case for the refusal of a new trial on the ground of the insufficiency of the evidence, where the evidence was conflicting, and the jury were instructed that the weight of the evidence did not necessarily depend upon the number of witnesses, and that they were the sole judges of the credibility of the witnesses and the weight of the evidence.

[1]Reported in 109 Pac. 307.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 18, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, for damages sustained by a passenger in alighting from a street car. Affirmed.

Morris B. Sachs, for appellant.

William Wray and *W. R. Bell*, for respondents.

Gose, J.—This is an action brought by the plaintiffs, as husband and wife, to recover damages for personal injuries sustained by the wife while alighting from one of the defendant's street cars. There was a verdict and judgment for the plaintiffs. Defendant has appealed.

The facts relied upon by the respondents to support the judgment are, that the wife became a passenger on one of the appellant's street cars; that the car stopped at the intersection of Second avenue south and Washington street, in the city of Seattle, in response to her notification to the conductor that she desired to leave the car at that point, and that, while she was in the act of alighting, the car suddenly and without warning started, throwing her to the ground, and causing the injuries complained of. At the trial of the case, the respondent offered herself as a witness, and was clear and emphatic in her statement that she sought to alight from the car at the point stated while it was standing, and that while stepping from it, it suddenly started and threw her upon the pavement. As to the fact of the injury she has abundant support in the evidence, but as to the cause of the injury her testimony is without corroboration.

The testimony shows that the car stopped at the intersection of Second avenue and Washington street, at which point the appellant's track crosses the track of the Seattle Electric Company. The appellant contends that the wife stepped from the car while it was in motion and when it was a short distance from the intersecting track. To support this view it offered four witnesses, the conductor, the motor-

man, and two women who were passengers on the car at the time of the accident. The conductor and one of the women testified that she stepped from the car while it was in motion. The motorman and the other woman testified that the car made only one stop before it crossed the other track. In denying the motion for a new trial, the learned judge said:

"There is a conflict in the testimony. Plaintiff swears positively that the car stopped and that while she was getting off, and before she had time to alight, it started. Defendant's witnesses swear that plaintiff got off before the car stopped. If her testimony is true, the verdict is founded in fact. If the defendant's testimony is true, the verdict is not founded in fact. A former jury have believed the plaintiff's testimony. The trial judge before whom it was tried, though granting a new trial, did not grant the same on the ground of insufficiency of evidence. The jury in this case have placed more weight upon the testimony of the plaintiff than upon that of the defendant's witnesses. The probative sufficiency of the plaintiff's testimony is a question for the jury. I am compelled to deny the motion for a new trial."

The appellant asserts that the evidence is insufficient to justify the verdict, that it was the duty of the trial judge to rule upon that question, and that it was his duty "to use his judgment and not to rely upon the judgment of the jury." It cannot be doubted that the trial court may, in proper cases, deny a motion for a new trial without assigning any reason for its action, and it is equally clear that it may, in the exercise of its discretion, where there is a substantial conflict in the testimony, decline to disturb the verdict on the ground of insufficiency of the evidence. We think the fair inference from the language of the court is that, considering the evidence in the light of the fact that two juries had found for the respondent, it could not be said that the evidence did not justify the verdict.

In cases of this character, the jury is the tribunal designated by the constitution to determine the facts. The court instructed the jury that it was "the sole and exclusive judges of the evidence in the case, and of the credibility of the wit-

nesses and the weight to be attached to the testimony of each; . . . that a fair preponderance of the evidence . . . does not mean necessarily that a greater number of witnesses shall be produced on one side or on the other; but that on the whole the jury believes the greater probability of the truth to be upon the side of the party having the burden of proof." There was no exception to this instruction, and it so obviously states the law that an exception would have been of no avail. In a long line of decisions, including *Welever v. Advance Shingle Co.*, 34 Wash. 331, 75 Pac. 863, and *Farrell Co. v. Ihrig*, 50 Wash. 281, 97 Pac. 52, we have held that, where there was a substantial conflict in the evidence and the trial court granted a new trial on the ground of the insufficiency of the evidence to justify the verdict, he was acting within his discretionary powers. The rule applies with equal force where the court below denies a motion for a new trial.

"Where there is a substantial conflict in the evidence the supreme court will not disturb the decision of the court below. This rule has been announced more frequently than any other rule of practice. It applies equally where the court below granted as where it denied the motion for new trial." Haynes, New Trial and Appeal, § 288.

In *Brown v. Seattle City R. Co.*, 16 Wash. 465, 47 Pac. 890, in considering the refusal of the trial court to grant a new trial, we said:

"We do not think it is the function of the court to weigh the credibility of the witnesses, and, where there is substantial conflict in the testimony, the case is for the determination of the jury."

The same view was expressed where a motion for a new trial was denied by the trial court in the following cases: *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55; *Pronger v. Old Nat. Bank*, 20 Wash. 618, 56 Pac. 391; *Miller v. Dumon*, 24 Wash. 648, 64 Pac. 804.

The appellant has cited *In re Palmer's Will*, 52 Wash. 644,

101 Pac. 220, and *Guley v. Northwestern Coal & Transp. Co.*, 7 Wash. 491, 35 Pac. 372. The *Palmer* case was a contest of a will, tried to the court, and what we said in that case has no application to the question before us. The *Guley* case has been criticized in this court in respect to the question we are considering until it is no longer authority on the subject. Where there is a substantial conflict in the evidence, and the trial court has refused a new trial and has instructed the jury that the weight of the evidence does not necessarily depend upon the relative number of witnesses testifying for or against a given issue, and that they are the sole judges of the credibility of the witnesses and the weight of the testimony, it would involve a legal absurdity for this court to reverse the judgment entered upon the verdict on the ground of the insufficiency of the evidence. To believe one witness and to disbelieve another or others is one of the admitted functions of the jury, and in this respect it cannot be censored or controlled by the courts. While it is true that verdicts must be based upon evidence, it is likewise true that the trial judge is not required to grant a new trial in every case where his opinion upon the facts differs from the opinion of the jury as expressed in the verdict. *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918. Indeed, it would seem that a trial court would be reluctant in any case to grant a new trial on the ground of the insufficiency of the evidence where substantially the same evidence had been twice submitted to different juries and both juries had reached the same conclusion upon the chief issue in the case.

The evidence being conflicting and there being competent evidence to support the verdict, we cannot disturb it without usurping the functions committed to the jury by the constitution. The judgment is affirmed.

Rudkin, C. J., Fullerton, Chadwick, and Morris, JJ., concur.

[No. 8174. Department Two. June 21, 1910.]

J. H. Bruff, *Respondent*, v. Northwestern Mutual Fire Association, *Appellant*.[1]

Insurance—Loss by Fire—Defenses—Incendiarism—Evidence—Sufficiency. In a civil action to recover insurance money the defense of incendiarism only requires a fair preponderance of the evidence, and there is sufficient evidence to require the submission of the same to the jury, where it appears that the plaintiff had the building and contents insured in his own interest, that he was alone at the house early in the evening and left, spending the night with a friend, that a "flash" fire occurred about 4: 00 a. m. and the firemen found the house intact, securely closed up, with coal oil distributed about the house in vessels, on the furniture and clothes, and the plaintiff claimed to have recently purchased and lost in the fire an unusual amount of valuable clothing and was unable to give the names of the merchants from whom it was purchased.

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered December 9, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a fire insurance policy. Reversed.

Shank & Smith and *Wende, Taylor & Delle*, for appellant.

Henry J. Snively, for respondent.

Crow, J.—This action was commenced by J. H. Bruff against the Northwestern Mutual Fire Association, a corporation, to recover $500 on an insurance policy. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

The policy was written on personal property located in respondent's residence in North Yakima. He alleged ownership of the property in himself, and its destruction by fire. Appellant affirmatively pleaded that the fire was of incendiary origin; that on June 13, 1907, respondent caused the dwelling house and contents to be burned, so as to procure

[1]Reported in 109 Pac. 280.

the insurance, and now contends that the trial court erred in withdrawing this affirmative defense from the consideration of the jury.

The respondent, a single man, lived alone in a one-story, four-room dwelling house in which the insured personal property was located. The policy was for $500, and he held a separate policy on the building. In his proofs of loss he presented a claim for personal wearing apparel and two Turkish covers amounting to $454.50, as follows:

"36	suits of underwear	$77.50
33	shirts	33.00
14	fancy vests	49.00
7	suits of clothing	145.00
3	pairs of odd pants	15.00
6	night gowns	15.00
6	gowns—sleeping	6.00
1	doz. silk handkerchiefs	9.00
2	Turkish covers	83.00
		$454.50"

He testified that their original cost was $638; that in December, 1906, he purchased thirty-six suits of underwear, twenty-four silk and mohair shirts, three suits of clothes, and nine fancy vests, in Spokane, on one and the same date, but was unable to tell the merchant or merchants from whom the purchases were made. He further testified that the greater portion of this wearing apparel was upon a clothesline or rope stretched diagonally across the particular room where the greatest destruction by fire occurred; that he was at the house a short time during the early hours of the evening preceding the fire; that he passed the night sleeping with a friend in another part of the city, and that he learned of the fire the next morning.

There was evidence that the fire occurred about 3:55 a. m.; that immediately after it was under control the firemen discovered in an enclosed hall a five-gallon can containing coal oil; that there was a stoneware slop jar in the hall partially

filled with water, with coal oil on the top of the water; that an ordinary dresser was in an adjoining bedroom, in the upper drawer of which were two shirts saturated with coal oil, and some paper also saturated with coal oil; that the dresser drawers were covered with coal oil; that in the bedroom was another slop jar containing water and coal oil; that at the time of the fire no one was in the house; that the doors were securely fastened; that the window shades in the front room were drawn and tacked down, and that the fire was what the firemen termed a "flash fire," indicating that it was of incendiary origin. There was no evidence that any other person had been in or about the building after respondent left it during the preceding evening.

The circumstances shown strongly indicate that the house had been deliberately and purposely prepared for a sudden, destructive, and well-timed conflagration. Respondent held separate insurance policies on the house and its contents, and was the only person in a position to recover for losses resulting from the fire. There was sufficient evidence, if accepted and credited by the jury, to sustain them in finding that the fire was of incendiary origin, and that some one who had access to and was familiar with the premises had deliberately arranged the house and its contents for destruction by fire. The respondent was the only person who lived in, or had constant access to, the house. He was there early in the evening, and left the building securely fastened. There was no evidence of any breaking prior to the arrival of the firemen. They found everything intact and well secured. The respondent testified that he passed the night with a friend, who corroborated his statements, but the weight and credibility of this evidence was for the exclusive consideration of the jury. Although the fire commenced at an early hour in the morning, arrangements might have been made causing it to ignite at that time. We do not assume that such plans were adopted, yet circumstances of a damaging nature, such as the condition of the house, the presence of the coal oil in

so many places, the well-timed absence of the respondent, the character of the fire, and other facts shown by the record, tend to implicate the respondent. Ordinarily it might not be suspicious for a single man living alone, in a small, plainly furnished house, not shown to have any particular means, to possess the quantity and quality of valuable clothing the respondent is claimed to have lost; yet the alleged possession of, and the claim for, such clothing were circumstances the jury should have been permitted to consider, in connection with the other facts, to aid them in deciding whether there was any motive which might induce the respondent to cause the fire.

The respondent, citing *State v. Pienick*, 46 Wash. 522, 90 Pac. 645, 11 L. R. A. (N. S.) 987, contends that the proof was not sufficient to show the fire to have been of incendiary origin. That is not a similar case. This is a civil action, in which a fair preponderance of the evidence only is necessary to establish the defense pleaded. In the *Pienick* case the defendant was prosecuted under an information charging the crime of arson, and it devolved upon the state to prove the alleged crime and its commission by the defendant beyond a reasonable doubt by evidence sufficient for that purpose. This court held that no motive was shown on the part of the defendant for the commission of the alleged crime, and that the proof was insufficient to sustain the charge that the fire itself was of incendiary origin. The rule as to the amount of proof necessary to establish the defense of incendiarism in a civil action on a fire insurance policy is well stated in such an action, and strongly fortified by the citation of numerous authorities in *Blackburn v. St. Paul Fire & Marine Ins. Co.*, 116 N. C. 821, 21 S. E. 922, in the following language:

"The charge of the court upon the 8th and 9th issues is not entirely clear, but it in effect amounts to an instruction that the defendants must show the conspiracy between the plaintiffs to burn and also the burning by W. A. Blackburn

'beyond a reasonable doubt,' for the court instructed the jury that there was a presumption of innocence and that they must find 'that there was no reasonable hypothesis consistent with the innocence of the plaintiffs' and that it is not sufficient 'that the facts and circumstances relied upon to establish the truth of the charge are consistent with it. They must be inconsistent with his innocence.' This is not the correct rule in civil actions which have nothing to do with guilt and innocence. The burden was upon the defendants as to these two issues to prove their allegations, by the preponderance of the evidence, but not beyond a reasonable doubt. It is true the authorities in other states are conflicting, but this is the general rule in civil actions and our courts have seen no reason to depart from it. *Kincade v. Bradshaw*, 10 N. C. 63; *Barfield v. Britt*, 47 N. C. 41; *Outlaw v. Hurdle*, 46 N. C. 150. Both reason and the weight of authority, especially the later cases, sustain the proposition, that 'in an action on a policy of insurance against fire, when the defendant pleads that the property was fraudulently burned by the plaintiff the defendant is not bound to prove such defense beyond a reasonable doubt.' "

We think that the affirmative defense pleaded, and the evidence tending to show the destruction of the property by a fire of incendiary origin, and to connect the respondent therewith, should have been submitted to the jury for their consideration.

The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8322. Department Two. June 21, 1910.]

J. W. Cairns, *Administrator, etc., Appellant*, v. Harvey A. Donahey, *Respondent*.[1]

Appeal—Right to Appeal—Executors and Administrators—Interest in Subject-Matter. Where no order has been made which tends to impair or diminish the estate and no final order has been entered determining the matter of his compensation, an administrator of an estate, appointed on the theory that the deceased died intestate, has no such interest in the subject-matter as to entitle him to appeal from an order revoking his letters and admitting a will to probate, as required in such case by Rem. & Bal. Code, § 1375.

Appeal from an order of the superior court for Whitman county, Sullivan, J., entered March 5, 1909, admitting a will to probate and revoking letters of administration, upon sustaining a demurrer to the answer and the entry of a default. Dismissed.

John Pattison, for appellant.

Hanna & Hanna, for respondent.

Crow, J.—On June 6, 1908, J. W. Cairns filed his petition in the superior court of Whitman county for letters of administration upon the estate of Rebecca A. Donahey, deceased, alleging that, on June 2, 1908, she died intestate. With the petition he also filed a written request for his appointment, signed by E. T. Trimble and H. A. Donahey, who were the sons and only heirs at law of the decedent. Letters were issued to Cairns, who qualified as administrator, filed an inventory, and published notice to creditors. Thereafter H. A. Donahey, one of the heirs of the deceased, filed his petition for the production and probate of her last will and testament, which he alleged was in the possession of the ad-

[1]Reported in 109 Pac. 334.

ministrator. After citation the administrator produced the alleged will and filed his amended answer, in which he alleged:

"That on the 8th day of June, 1908, upon the written request of E. T. Trimble and H. A. Donahey, he the said H. A. Donahey being the identical person who petitioned the court for the probate of said will, said J. W. Cairns filed herein his petition for his appointment as administrator of the estate of said Rebecca A. Donahey, deceased; that after due and legal notice being given of said petition for appointment of said administrator, the above court on the 20th day of June, 1908, duly and regularly appointed said J. W. Cairns the administrator of said estate of Rebecca A. Donahey, deceased; that said J. W. Cairns on the 30th day of June, 1908, duly filed his bond as said administrator and the same was on said day duly approved; that on the 22d day of July, 1908, said J. W. Cairns duly qualified as said administrator and letters of administration were on said day duly issued to said J. W. Cairns and ever since said time said J. W. Cairns has been and now is the duly qualified and acting administrator of said estate.

"Said J. W. Cairns objects to the probate of said purported will and to the revocation of his appointment as administrator of said estate for the following reasons:

"That on the — day of May, 1908, at the residence of said Rebecca A. Donahey, near the city of Colfax, Whitman county, state of Washington, said Rebecca A. Donahey being then in feeble health physically but being in the possession of all of her natural faculties and of sound mind and fully understanding the nature of her acts, requested J. W. Cairns of Colfax, Washington, now administrator herein, to procure the will that she had executed on the 19th day of May, 1905, being the will now on file herein, and then and there stated to the said J. W. Cairns, that she desired said will so that she might destroy, burn and revoke the same; said J. W. Cairns then and there procured a paper resembling said will and stated to said Rebecca A. Donahey, and said J. W. Cairns placed said paper, which he had represented to the said Rebecca A. Donahey was her said last will, in the stove at the residence of and in the presence of said Rebecca A. Donahey and burned and destroyed the same and said J. W. Cairns then and there stated to the

said Rebecca A. Donahey that he had burned and destroyed said will; said Rebecca A. Donahey believed the said statements of said J. W. Cairns and stated that she was now satisfied that said will was burned, destroyed and revoked."

The will by its terms devised one dollar to E. T. Trimble, and the remainder of the estate to H. A. Donahey who was named as executor. E. T. Trimble, as an heir at law, filed an answer, objecting to the probate of the will. To his answer and the amended answer of the administrator separate demurrers were sustained, and defaults were afterwards entered. Thereafter, on proof taken, the will was admitted to probate, H. A. Donahey was appointed executor and J. W. Cairns was removed as administrator, his letters being revoked. On May 12, 1909, Cairns filed his report as administrator, which was approved, permission being granted him to renew his request for compensation in the due course of administration. From the order admitting the will to probate, appointing H. A. Donahey executor, and revoking the letters of administration, this appeal has been taken by the administrator alone.

The respondent, H. A. Donahey, has interposed a motion to dismiss the appeal, in substance contending that the order entered is not one from which the administrator may appeal. An appellant must have an interest in the subject-matter of the appeal. Otherwise he is not entitled to obtain a review of the order, decree, or judgment of which he complains. Appellant was appointed administrator upon the theory that Mrs. Donahey died intestate. When her will was admitted to probate it became the duty of the trial court to revoke his letters. Rem. & Bal. Code, § 1375. He was a stranger to the will and the estate. In *Cullen v. Bowen*, 36 Wash. 665, 79 Pac. 305, this court held that a stranger to a will cannot be heard to question its validity. In the case of *In re Cannons' Estate*, 18 Wash. 101, 50 Pac. 1021, this court, while holding that an executor might appeal from an order which tended to impair the estate, said:

"We also are of the opinion that the executor could take the appeal, even though any of the parties interested in the proceeds of the estate could have prosecuted one. The case is essentially different from that of a contest between claimants to the estate as heirs or devisees, when it is ready for distribution. There the administrator or executor may not take sides, for if so he might resist the rightful claimant at the expense of the estate to which he might ultimately be found entitled. Such claims do not impair the estate, but relate only as to who is entitled to the same. But here was a claim that would materially diminish the estate, and it was resisted on the ground that it could not be made to any extent a lawful charge upon the community estate of A. M. and Jennie F. Cannon; and that is the only question we have to consider in this connection. It being the duty of the executor to protect and preserve the estate pending its settlement, in discharging such duty he must have the right to appeal from an order like the one here in question, and, without discussing the various authorities cited by the parties, it is sufficient to say that such a right is generally sustained."

No order has been made in this cause which tends to impair and diminish the estate, or which calls upon the administrator to prosecute an appeal for its preservation. If Mrs. Donahey in fact died intestate, her estate would descend to her two sons as her only heirs at law, in equal shares. Under the will, E. T. Trimble will receive one dollar as a legacy, and the remainder of the estate will pass to H. A. Donahey. These two sons are the only persons interested in the final distribution, but neither of them has appealed. It is no concern of the administrator whether the estate shall be administered under the will or not.

"Besides having an interest in the subject-matter of the suit, it is necessary, in order to maintain an appeal, that the person taking it be injuriously affected by the judgment, order, or decree appealed from, so that one cannot appeal from a decision, however erroneous, which does not affect his substantial rights." 4 Enc. L. & P. 81.

We fail to understand how the administrator has any interest in the subject-matter of this appeal, or how he is in-

juriously affected by the final order entered. He has no interest in the estate other than for compensation that may be due him. The heirs at law appeared in person, one to obtain an order probating the will and the other resisting the same, and as we have stated, neither of them has appealed, although they are the only parties in interest. No final order has been entered in the matter of compensation due Cairns as administrator, for the services of himself or his attorney. Had such an order been made and had he been aggrieved thereby, he would have such an interest as would entitle him to an appeal. But no such question is presented by the record before us.

The appeal is dismissed.

RUDKIN, C. J., MOUNT, DUNBAR, and PARKER, JJ., concur.

[No. 8814. Department Two. June 21, 1910.]

PUGET SOUND NATIONAL BANK, *Respondent*, v. ANNIE BISWANGER *et al.*, *Appellants*.[1]

TAXATION—TAX TITLE—VACATION—PAYMENT OF TAX—OMISSION OF TAXING OFFICER. A tax foreclosure and deed is void where the owners, in an honest attempt to pay the taxes, delivered to the county treasurer a list of the property and blank checks with authority to fill in the same for the amount, and through an error of the treasurer, not known to the owners, taxes on part of the property were not paid.

SAME—TAX RECEIPT. In such a case actual payment is made, and the tax receipt given is only evidence of payment and is immaterial.

SAME. Where taxes on part of the lands had in past years been paid by a lessee in possession, and the owner gave the county treasurer sufficient to pay all the taxes, he is not bound to notice an obscure annotation in the tax receipt stating, "less pt. to O. I. Co.," as disclosing the mistake of the county treasurer in excepting part of the lands.

[1]Reported in 109 Pac. 327.

TAXATION—ACTION TO SET ASIDE TAX TITLE—PLEADING—AMENDMENT—WAIVER. In an action to set aside a tax title, it is not an abuse of discretion to allow a complaint alleging excusable neglect in paying the taxes to be amended to allege payment and a mistake of the county treasurer, where no application for a continuance was made.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 28, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to cancel a tax title. Affirmed.

William C. Keith, for appellants.

Harold Preston, for respondent.

DUNBAR, J.—This is an action to vacate the proceedings in a tax foreclosure action involving the lands in question, and to cancel the record of tax deeds. The judgment was in favor of the plaintiff.

It is unnecessary to set forth the deraignment of title in the plaintiff. The court found, among other things, that the Puget Sound National Bank, owning a two-fifths undivided interest, and Mary B. Kittenger, owning a one-fifth undivided interest in said land, endeavored to pay before delinquency all taxes assessed thereon for the years 1901-2-3-4, by paying to the county treasurer the full amount of said taxes; but of the moneys so paid to him the county treasurer applied only enough to pay the taxes upon all of said property except tax lot 4 hereinafter described, and delivered receipts to the said Puget Sound National Bank reciting the payment of all of said taxes for the years 1902 and 1903, but the 1901 and 1904 receipts delivered by him to said bank contained an exception of a part to the Oregon Improvement Company; that the said treasurer delivered to said Mary B. Kittenger receipts showing full payment of all said tax on all of said land for the years 1901-2-3, but the receipt delivered by him to her for the 1904 taxes contained

an exception of a part to the Oregon Improvement Company; that for said years the portion of the land above described, which is hereinafter described as tax lot No. 4, was sold to the Oregon Improvement Company, a corporation which had previously been operating a railroad in King county; that at the time of receiving said receipts, both the said bank and said Kittenger were ignorant of the fact that any of the said land had been assessed to the said Oregon Improvement Company, and were misled by such receipts into believing that the excepted part was intended in each case to be the right of way of the Northern Pacific Railway Company, and neither the said bank nor the said Mary B. Kittenger ever knew that the taxes upon any part of such land for said years had not been paid, until long after the tax foreclosure proceedings hereinafter referred to, nor until shortly before the commencement of this action; nor did either of them ever have any knowledge or notice of the pendency of said tax foreclosure proceeding, but first learned of it within thirty days prior to the commencement of this action, and no summons or other process in said tax foreclosure proceeding was ever served upon them or either of them; that owing to the mistake of the county treasurer aforesaid in not paying the taxes upon said lot 4 out of the money so as aforesaid paid him by the owners thereof for that purpose, and owing to misunderstanding of the facts aforesaid by the said Kittenger and the bank, the taxes upon said lot No. 4 were not paid for the years 1901-2-3-4, and that subsequently a certificate of delinquency issued; and recited the proceedings leading up to the tax judgment.

The court also found that in such tax foreclosure proceeding, the plaintiff, A. Biswanger, could readily have made service upon said Oregon Improvement Company and its successor the Pacific Coast Company, or either of them; that he made no *bona fide* effort to give notice to such companies or either of them, of said tax foreclosure proceedings; that he caused a summons in said action to be published in the

Auburn Argus, a weekly newspaper published at the town of Auburn in the extreme south end of King county, said newspaper having a limited circulation of five hundred copies, of which not to exceed one hundred and twenty-five were circulated in the city of Seattle, where the said Mary B. Kittenger lived and where the said Pacific Coast Company has its place of business; that no personal service of summons was ever attempted upon any one in such foreclosure action, and no other service by publication was ever made or attempted than that above described.

We think these findings are supported by the testimony in the case. It may be conceded, we think, that there was a *bona fide*, honest attempt on the part of the owners of this land to pay the taxes on the same. The testimony shows that the agent of the Puget Sound National Bank, plaintiff herein, went to the treasurer before the taxes became delinquent and delivered to him a check of said bank with the amount left blank, instructing him to pay the taxes on a list of lands which the agent then delivered to the treasurer, and to fill in the amount in the check necessary to make such payment. The same thing was done by Kittenger, as agent for his wife Mary B. Kittenger, who was then the owner of a portion of the land, except that the check in this instance and the list of lands upon which the tax was desired to be paid were sent by mail.

We have decided, in *Smith v. Jansen*, 43 Wash. 6, 85 Pac. 672; *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675; *Loving v. McPhail*, 48 Wash. 113, 92 Pac. 944, and *Taylor v. Debritz*, 48 Wash. 373, 93 Pac. 528, that the efforts of the owner in good faith to pay a tax before delinquency, which was prevented by mistake of the county treasurer, was equivalent to a payment, and rendered a tax sale therefor void. In *Smith v. Jansen, supra*, it was decided that the *prima facie* presumption arising from the production of the tax deed was overcome by the admission that the tax had been paid; that the statute by clear and unmistakable impli-

cation permits the property owner to show in a collateral proceeding that the tax or assessments have been paid, or the real estate was not liable to the tax or assessment, and that, when either of these facts is shown, the implication that the tax judgment and tax deed must give way is equally explicit. We have frequently held that the property owner is chargeable with notice that taxes are levied against his property annually, and that it is his duty to see that the taxes are paid. It is necessary for the perpetuity of the government that the public revenues be collected. But it was said in *Smith v. Jansen*, that, when the property owner had paid his taxes, he had discharged his obligation to the state, and that he had no reason to expect that proceedings would be taken against him or his property, and he was not required to be ever on the lookout lest some negligent or corrupt official should cause or suffer his property to be sold for a tax that had long since been paid.

The question to be determined in this case is, Do the facts found by the court, and which are sustained by the record, bring the plaintiff within the rule announced in these cases? It is true that, in most of these cases, the taxes had actually been paid and, by some mistake of the treasurer that fact did not appear; but there was an honest and *bona fide* attempt on the part of the owners in this case to pay the taxes. Money had been forwarded to the treasurer for that purpose, there being no question raised here of the value of the checks furnished.

But it is contended by the appellants that the exception noted in the tax receipt was sufficient to give notice to the owners that the taxes had not been paid on a portion of this land. It seems that a strip of land had been leased to the Oregon Improvement Company for use in the operation of its road, with the agreement that the said company was to pay the taxes on that strip of land; that it had paid the taxes for some time, and had finally abandoned the land, and had not since said abandonment paid said taxes; that the

Northern Pacific Railway Company also was in the possession and use of a certain portion of this land and, as the court found, had paid the taxes on the portion which it occupied. The court found that, by reason of this condition, the owners were misled by the statement in the receipts, thinking that it referred to the portion of the land on which the Northern Pacific Railway Company was to pay taxes, and believing that such taxes had been paid, and the fact was that such taxes had been paid by the Northern Pacific Railway Company. The tax receipts are exhibits in the case, and they show a receipt for the land in question but, immediately after the description of the land, is added in some of the receipts, in very close lettering and mostly written in indelible pencil where the words are more or less run together, the following: "less pt. to O. I. Co."; and in some instances: "less pt. to Og. Im. Co." It would take a close inspection of these receipts to bring to the notice of the payor the fact that the taxes on the land described in the receipt had not all been paid, and it is difficult to tell just what the words do mean. But in any event, money sufficient to pay the taxes on all the land had been sent to the treasurer, accompanied by a list of the property, with instructions to pay the taxes on the property listed, and that would be a good payment if the receipt had never been issued at all. The essential thing is the actual payment of the taxes. The receipt is, of course, only evidence of such payment, and is only important here to the extent that it sustains the contention that it gave notice to the owners that all the taxes had not been paid. Having paid the taxes as a matter of fact, there is no legal obligation on the part of the payor to even look at the receipt. That is purely precautionary. But even if it did, we think the annotations in this receipt, if they can be so denominated, were so obscure and uncertain that they would not convey definite notice to the payor. It is not the policy of the law that the owner should lose his land through excusable mistake, and while it may not be

said that there was any negligence on the part of the treasurer in this case, the fact remains that an honest attempt had been made on the part of the owners to pay the taxes, and that the mistake was one which the exercise of ordinary prudence would not detect.

It is also contended by the appellants that the court erred in allowing respondent to amend its complaint from an alleged excusable neglect of the owner in failing to pay the taxes, to an alleged mistake of the county treasurer. This question of amendment is largely discretionary with the trial court who is familiar with all the circumstances of the case, and we are unable to see in this particular case that the discretion was abused. In any event, no application was made for a continuance, and it has been the uniform decision of this court that, if the defendant deemed itself misled by the change in the complaint, its remedy is to ask for a continuance. In *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652, the court, after reciting the facts, said:

"In the light of these facts, it would hardly seem that the appellant could be in earnest when it insists that it was misled as to the person intended to be charged with negligence; but if it were true that it was misled, it did not pursue the remedy necessary to make the error available to it on appeal. It was not enough to object to the amendment. It should have asked for a continuance on the ground of surprise, and not having done this it is in no position to complain of the ruling as made."

Other questions are discussed in the briefs, but they are not controlling. We think the judgment of the court was right, and it will therefore be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8647. Department Two. June 21, 1910.]

CHARLES KNUST, *Respondent*, v. J. W. BULLOCK *et al.*, *Appellants*.[1]

MASTER AND SERVANT—RUNAWAY TEAM—INJURIES TO THIRD PERSONS—EMPLOYMENT OF SERVANT—EVIDENCE—SUFFICIENCY. In an action for injuries caused by a runaway team, evidence that the team belonged to the defendants establishes, prima facie, that they were in defendants' possession, and that the driver was in control of them.

APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE. Error cannot be urged in the admission of statements by an agent that he was employed by the defendants, when it was not objected to at the time and a prima facie case of employment had been made out.

SAME—EVIDENCE—SUFFICIENCY. Error cannot be predicated on insufficiency of the evidence to sustain a liability upon one ground where there was no request to withdraw that ground from the consideration of the jury, and there was sufficient to sustain a recovery on another branch of the case.

Appeal from a judgment of the superior court for King county, Irwin, J., entered October 27, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Fred H. Peterson and *Philip D. MacBride*, for appellants.

William E. Froude and *E. L. Rinehart*, for respondent.

MOUNT, J.—This action was brought by the respondent to recover damages for the loss of a horse, and for injuries to a wagon and harness, caused by another team of horses running away and colliding with the team belonging to the respondent. The cause was tried to the court and a jury. A verdict was returned in favor of the respondent for $245, against appellants Bullock and wife, the owners of the team which ran away, and against James Harvey, the driver

[1]Reported in 109 Pac. 329.

thereof. This appeal is prosecuted by Bullock and wife from a judgment upon the verdict. Defendant Harvey has not appealed.

The complaint alleged, in substance, that the defendant Harvey was employed by the appellants as driver of a team of horses, and that Harvey negligently permitted the team to run away and into the respondent's horses and wagon, causing the injury complained of. The complaint also alleged that the team which ran away was wild, dangerous, and unsafe to be driven upon the public streets except by the most competent driver, and that the appellants were negligent in employing an incompetent driver. The appellants denied generally the allegations of the complaint, and then alleged, by way of affirmative defense, that they were the owners of a certain team of horses, and that on the date of the accident they let this team to the defendant Harvey, to be used exclusively by said Harvey for his own purposes and not for the business of the appellants, and that the said Harvey had the sole control of said horses, and if the respondent was damaged by reason of the use of said horses, the appellants were not responsible.

It was conceded at the trial of the cause that the team of horses which ran away belonged to the appellants, and was in charge of the defendant Harvey on that day. The evidence on the part of the respondent tended to show that Harvey left the team standing in the street in Seattle, without being hitched or guarded in any way, and while he was in a store the team ran away and did the damage complained of; that immediately after the team had run into the respondent's team and wagon, the defendant Harvey came up, and when asked whom the team belonged to, said: "I am just working for Mr. Bullock. He owns the outfit." There was evidence to the effect that the team which ran away was nervous and of a high-spirited disposition. At the close of respondent's evidence, the appellants moved the court for a directed verdict, which motion was denied. The evidence of

the appellants was to the effect that the defendant Harvey had been employed by them for some time, but in the capacity of a coal carrier and not as a driver of any team; that on the date of the accident the team of horses was hired to defendant Harvey, for his personal use and in no way for the appellants. On this appeal the main contention of the appellants is that the evidence is insufficient to show that Mr. Harvey was the servant of the appellants at the time of the accident, and that his declarations at that time are inadmissible to show that he was the servant of the appellants.

In cases of this kind, where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the wagon and team were in possession of the owner, and that whoever was driving it was doing so for the owner. *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940; *Schulte v. Holliday*, 54 Mich. 73, 19 N. W. 752; *Norris v. Kohler*, 41 N. Y. 42; *Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. 353. This being the rule, it is plain that the plaintiff made a case for the jury, and that the court did not err in refusing to direct a verdict in favor of the defendants. If the declaration of the driver at the time of the accident is as a rule not admissible to prove his employment, no error can be based on that declaration in this case, because the evidence was not objected to at the time it was given, and also because that presumption followed as a matter of law, as we have seen above. It was therefore harmless.

Appellants argue that there is no evidence that the team which ran away was a vicious or dangerous team. If we should agree with this contention, there was still enough to go to the jury on the other branch of the case. The trial court was not requested to take this question away from the jury, and it is not shown that the verdict was based on such facts. The controlling question in the case was, whether the defendant Harvey was in the employment of the appellants,

or whether he had hired the team for his own personal use. This question was one for the jury under the evidence.

We find no reversible error in the case, and the judgment must therefore be affirmed.

Rudkin, C. J., Crow, Dunbar, and Parker, JJ., concur.

[No. 8621. Department One. June 22, 1910.]

Walter L. Johnstone, *as Receiver of H. N. Nelson Company, Appellant*, v. George E. Black, *Respondent*.[1]

Corporations—Stockholders—Pledges—Stock Held as Collateral Security—Liability for Unpaid Subscriptions. The pledgee of corporate stock, holding the same as collateral security for a loan made by him to the corporation, the stock being represented to him as issued to another and fully paid for, is not liable upon the statutory liability of stockholders to creditors for unpaid subscriptions, although the stock was re-issued in his name and stands on the books as his absolute property, in view of Rem. & Bal. Code, § 3700, providing that pledgees and persons holding stock as collateral security shall not be liable to creditors as stockholders, but that the pledgor only shall be liable.

Appeal from a judgment of the superior court for King county, Kauffman, J., entered July 24, 1909, upon findings in favor of the defendant, in an action to enforce liability for an unpaid subscription to the capital stock of a corporation, after a trial on the merits before the court without a jury. Affirmed.

Walter L. Johnstone and *H. A. P. Myers*, for appellant.

King Dykeman and *Stephen V. Carey*, for respondent.

Morris, J.—Action to recover upon the statutory liability for unpaid subscription to the capital stock of the H. N. Nelson Company. The court below found that respondent

[1]Reported in 109 Pac. 367.

was the owner of one share of the stock of the insolvent company, and gave judgment against him in the sum of eight dollars. It was also found that Black held four hundred and ninety-nine shares as collateral security for a loan of $1,000 to the company, and as to such stock he was discharged from liability, and the receiver appeals.

The first contention of appellant is that respondent is the owner of five hundred shares of the capital stock of H. N. Nelson Company, and not a pledgee. This is a question of fact to be determined from the evidence, and after a careful reading of the record, we reach the same conclusion as did the court below: That on December 14, 1906, the company requested of respondent a loan in the sum of $1,000, to be repaid with interest at eight per cent as soon as the company was in a financial condition to do so, and that as security for the repayment of this loan, the company delivered to respondent five hundred shares of its capital stock in two certificates, one for four hundred and ninety-nine shares and the other for one share. At the time of this delivery H. N. Nelson, the president of the company, represented to respondent that this stock was fully paid for, it having previously been issued to one Hausman, and by him assigned in blank. The theory upon which the court below found against respondent as to the one share was this: Hausman, who had been acting as a trustee of the company, resigned, and the president requested respondent to act as trustee in his place. Respondent consented and, at the request of the president, surrendered his certificates of stock, and there was issued to him in lieu thereof two other certificates, one for four hundred and ninety-nine shares and the other for one share; that it was the understanding at that time that only the four hundred and ninety-nine shares should be held as collateral security, while the one share should be held as owner, so that respondent might under the law act as trustee of the company. No cross-appeal having been taken, that feature of the court's decree

is final, and nothing more need be said as to it. It being, then, determined as a question of fact that respondent held the four hundred and ninety-nine shares only as collateral security, the next question is, what liability, if any, attached to him.

Appellant contends that, assuming Black held the stock only as pledgee, yet as he appeared upon the books of the corporation as the absolute owner of the stock, he is liable to creditors as a stockholder, and in support of this contention many cases are cited. It would appear from an examination of these authorities that, where the relation is not controlled by statute, it is well established that the rule is as contended for by appellant. But it is as clearly established that, when the liability is fixed and determined by statute, a different situation arises. We have such a statute here. Rem. & Bal. Code, § 3700, provides:

"No person holding stock as executor, administrator, guardian, or trustee, or holding it as collateral security or in pledge, shall be personally subject to any liability as a stockholder of the company, but the person pledging the stock shall be considered as holding the same, and shall be liable as a stockholder, and the estate and funds in the hands of the executor, administrator or guardian or trustee shall be liable in like manner and to the same extent as the testator or intestate, or the ward or person interested in the trust fund would have been if he or she had been living and competent to act and hold stock in his or her name."

It seems clear from a reading of this statute that the only liability upon stock in the hands of a pledgee as collateral security is against the pledgor. Statutes of like import may be found in a number of the states, and so far as we have been able to discover, the only enforceable liability has been that against the pledgor. *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 15 S. W. 630, 1 Am. St. 776; *Matthews v. Albert*, 24 Md. 527; *McMahon v. Macy*, 51 N. Y. 155; *Henkle v. Salem Mfg. Co.*, 39 Ohio St. 547; *Baker v. Old Nat. Bank*, 86 Fed. 1006.

A like rule has been announced by the supreme court of the United States in construing the Missouri statute (*Burgess v. Seligman*, 107 U. S. 20) wherein it is said:

"The reason of this law is derived from the gross injustice of making a person liable as the owner of stock when he only holds it in trust or by way of security, and from the inexpediency of putting a clog upon this species of property, which will have the effect of making it unavailable to the owner, or of deterring prudent and responsible men from accepting positions of trust where any such property is concerned. It seems to us that not only the law, but the reason upon which it is founded, applies to the holders of stock as collateral security, whether received from an individual or from the corporation itself."

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8793. Department One. June 23, 1910.]

P. L. C. OLMSTEAD, *Respondent*, v. THE CITY OF OLYMPIA, *Appellant*.[1]

APPEAL—REVIEW—VERDICT. A verdict supported by substantial evidence cannot be set aside on appeal because of conflict in the testimony, or because against the weight of the evidence.

TRIAL—VERDICT—SPECIAL VERDICTS. A general verdict against a city for injuries sustained through a defect in a planked street is not contradicted or controlled by a special finding to the effect that the defect, if seen by an ordinarily prudent man prior to the accident, was not such as to lead him to anticipate that an accident was likely to result; since the interrogatory was general and applicable to several classes of persons and not sufficiently restricted to the circumstances of the case.

TRIAL—INSTRUCTIONS. Error cannot be predicated on instructions isolated from their context, if the charge as a whole is correct.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered July 21, 1909, upon the

[1]Reported in 109 Pac. 602.

verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained by reason of a defective street. Affirmed.

George R. Bigelow, for appellant.

Troy & Sturdevant, for respondent.

FULLERTON, J.—The respondent, Olmstead, brought this action against the appellant, city of Olympia, to recover damages for an injury caused his horse while the animal was being driven on one of the streets of the appellant city. At the place where the injury occurred the street was planked. The planks used were three inches by twelve inches in size and of varying lengths, were laid crosswise with the course of the street, on stringers running parallel therewith. Where the planks did not reach the entire width of the roadway they were laid end to end and spiked to the stringers. At one of these junctions a plank was used which had been partially cut away at one corner so that when it was laid against the abutting board it left a triangular shaped hole some six inches across at its widest place, and of a depth equal to the thickness of the plank. The horse stepped into this hole, caught the heel of his shoe therein in some manner, and tore away the greater part of his hoof in his effort to extricate his foot.

The jury before whom the case was tried returned a general verdict in favor of the respondent, and returned answers to certain interrogatories submitted to them by the court as follows:

"(1) Was the defect in the street which caused this injury such a defect as would be noticed by ordinary passers-by not knowing of the accident? Answer: No.

"(2) Was the defect in the street which caused this injury such a defect as would lead an ordinary prudent man not knowing of the accident to pay particular attention to it? Answer: No.

"(3) If the defect in the street which caused this injury was to have been seen by an ordinary prudent man prior to

the accident, was the defect such a defect as would lead him to anticipate that an accident was likely to result therefrom? Answer: No."

The first assignment of error now open to the appellant is the ruling of the court denying its challenge to the sufficiency of the evidence to sustain a verdict in favor of the respondent. It is argued, with much earnestness and force, that the evidence fails to show knowledge on the part of the city, either actual or constructive, of the existence of the hole causing the injury, or that the hole itself was of such a nature as would lead the city officers in the exercise of due care on their part to believe that an accident was likely to result therefrom. An examination of the record has convinced us that the jury might well have found with the city on these questions. Indeed, we think that the preponderating weight of the evidence is with that side of the controversy. But we are without authority, nevertheless, to interfere with the verdict. There is substantial evidence in the record tending to support the respondent's case; and such being the fact it was within the province of the jury to make the decision they did make, and we have no lawful right to interfere therewith. As we have said on other occasions, to hold otherwise is to make this court the final arbiter on questions of fact as well as of law, and to deny to litigants their constitutional right of trial by jury.

It is next argued that the answers to the interrogatories have the force of special verdicts, that these are inconsistent with the general verdict, and the rule is invoked that where both special and general verdicts are returned, the one inconsistent with the other, the special verdict controls. We think, however, there was no such inconsistency as to require a reversal of the judgment. The only one of the answers returned that could be said to conflict with the general verdict is the answer to the third interrogatory. But the rule therein stated does not measure the duty of the city with reference to this particular case. The test of negligence is not what

an ordinarily prudent person would do or omit to do generally, but what an ordinarily prudent person would do or omit to do under circumstances like and similar to those surrounding the person whose conduct is under test. In other words, negligence is the want of care required by the circumstances. For example, the discovery of the hole in question might not excite apprehension in the mind of an ordinarily prudent person whose property was in no danger therefrom, or who had no duty to perform in reference thereto, such as the ordinary pedestrian, or a person riding on a bicycle or driving an automobile, while it might at once excite apprehension in the mind of such a person driving a team of horses, or who is charged with the duty of keeping the street in repair for the prevention of accidents to animals. The question submitted to the jury, it will be observed, points with as much directness to the first class of persons mentioned as it does to the latter. We think, therefore, that it was too indefinite to be allowed to control the general verdict.

Some criticism is made of the instructions of the court to the jury, but we find it unnecessary to notice them specifically. In one or two instances the judge might have found more appropriate words in which to express his meaning, but the charge as a whole is correct, and this is the ultimate test. When the charge as a whole fully and fairly states the law of the case to the jury, it is not erroneous even though expressions can be found therein which, isolated from their context, state the law too broadly.

The judgment is affirmed.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

[No. 8815. Department Two. June 23, 1910.]

J. M. MOORE, *Appellant*, v. HERBERT MARSH *et al.*, *Respondents*.[1]

REPLEVIN—PLEADING—OWNERSHIP—BURDEN OF PROOF. In replevin an affirmative answer of ownership in the defendant is nothing more than a denial of plaintiff's allegation of ownership, and the burden of proof is upon the plaintiff to show title in himself or right to possession.

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. The granting of a new trial for error in instructions, although no exceptions were taken to the instructions, is so far discretionary with the trial court that it will not be reversed on appeal, if the instructions were erroneous.

Appeal from an order of the superior court for Kitsap county, Yakey, J., entered December 16, 1909, granting defendants a new trial, after a verdict by a jury in favor of the plaintiff, in an action of replevin. Affirmed.

John S. Jurey, for appellant.

William C. Keith, for respondents.

DUNBAR, J.—This is an action for replevin for a team of horses, wagon, and harness. The complaint alleged ownership and right to possession in the plaintiff, value etc., wrongful detention by the defendants, and refusal to surrender on demand. The answer admitted the possession of the property by defendants, and their refusal to surrender, but set up affirmatively ownership and right to possession in the defendants. The case was tried before the court and a jury, resulting in a verdict for the plaintiff. Defendants moved for a new trial, which motion was granted. The appeal is from the order granting a new trial.

In granting a new trial, the court stated that the same

[1]Reported in 109 Pac. 606.

was granted upon the ground that the court erred in instructing the jury that the burden was upon the defendants to prove by a fair preponderance of the evidence their affirmative defense contained in their answer, and it is insisted by the appellant that, under the rulings of this court in *Armstrong v. Musser Lumber & Mfg. Co.*, 43 Wash. 584, 86 Pac. 944, the order granting a new trial must stand or fall alone upon the ground mentioned by the court. We may concede this contention, but it has also been held by this court that the first instruction, which the court corrected by granting an order for new trial, was erroneous. In *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121, in discussing this proposition, it was said:

"Under a general denial, the defendants would have been permitted to have shown that they had fully paid for the instrument in question, and the plea of payment here neither abridged nor enlarged their right of proof in that regard, nor placed the plaintiff in any different position from that in which a general denial would have placed him. The onus is upon the plaintiff to prove title in himself, and this was the real issue in the case. The plea of payment was, in effect, a plea of property in the defendants. Under such a plea, the burden is upon the plaintiff to show his title."

In this case the plea was a plea of property in the defendants, and it was rightly said in that case such a plea neither abridged nor enlarged their right of proof in that regard. When the plaintiff alleges that he is the owner of the property, and the defendant affirmatively alleges that he is the owner of the property, it plainly amounts to nothing more than a denial of the allegations of the complaint, and the burden of proof cannot be on both plaintiff and defendant. It leaves the case under the operations of the general rule, that the burden is upon the plaintiff to sustain the allegations of his complaint. This proposition is treated by Cobbey on Replevin (2d ed.), in § 1005, where it is said:

"In replevin, where the defendant pleads property in himself, the burden of proof is upon the plaintiff to show title to

the property or his right to possession, and the defendant has a right under this plea to show by what means he came into possession of the property and his title thereto. Under a claim of title in the defendant the *onus* is on the plaintiff to establish his title and right to possession of the property."

Many cases are cited to sustain this announcement, and the further announcement that "a plea of property in a defendant or in a stranger casts the burden upon the plaintiff of having by a preponderance of evidence property in himself."

But it is insisted by the appellant that this instruction was not excepted to and that, under the rule announced in *Hawkins v. Casey*, 38 Wash. 625, 80 Pac. 792, the error cannot be considered by this court. It is true that in that case, as in others, we have said that, in the absence of an exception to instructions, objections of this character urged for the first time in this court cannot be considered. But that does not apply to the case at bar, where the objection here was urged before the lower court, brought to the attention of the lower court by the motion for a new trial, and passed upon by that court. Motions for new trial are largely in the discretion of the trial court and, while strictly speaking there is no discretion involved in granting a new trial upon a legal proposition, yet it is the duty of the court to see that the cause is submitted to the jury upon proper instructions; and under such circumstances the appellate court would be doing violence to right to reverse such action on the part of the trial court where, by reason of such action, the ends of justice are subserved, even though a strict construction would not warrant the action of the court. But in this instance, both technical law and justice demanded the order made by the court.

The judgment is affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8594. Department One. June 23, 1910.]

W. K. MACFARLANE, *Respondent*, v. ALLAN-PFEIFFER CHEMICAL COMPANY, *Appellant*.[1]

WORK AND LABOR—MONTHLY SERVICES—LOST TIME. A traveling salesman employed by the month cannot recover for services during time lost by reason of his sickness.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 18, 1909, upon findings in favor of the plaintiff, in an action on contract. Reversed.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellant.

Jas. A. Dougan, for respondent.

MORRIS, J.—In January, 1906, respondent was employed by appellant as a traveling salesman, at a wage of $125 per month and expenses. He was discharged July 2 following, and in January, 1909, he brought this action to recover $208.40, claimed to be due on account of unpaid wages. The answer admitted the employment, but denied the service for the full period of six months; alleged about fifty-five days' lost time in the months of April, May, and June, and an overpayment of $16.40. The court below found in favor of plaintiff, and defendant appeals.

There can be no question but that respondent performed no service during the time claimed by appellant. He does not claim to, except that, between April 12 and 22, when he admits he was at home ill, he says he sent in an order for a Seattle house, and that, between May 7 and 31 when he admits being at home, he mailed about five hundred postal route cards. The question then presented is, can a servant

[1]Reported in 109 Pac. 604.

employed by the month recover for lost time. It is well settled that he cannot. Under the old common law rule, when the servant was employed for a fixed time, the contract was considered as an entirety, and no recovery could be had except for complete performance. The rule was early modified by the American courts, and it was held that, when, because of sickness or other reason not the fault of the servant, he was unable to continue in his employment, he could, nevertheless, recover *pro rata* for the service actually performed, less any damage caused by reason of failure of complete performance. *Dunlap v. Montgomery*, 123 Pa. St. 27, 16 Atl. 41. The same reasoning which protects the servant in permitting him to recover for service actually performed, protects the master in not holding him liable except for services actually performed; and the servant cannot recover for time lost through his own illness or other inability to perform the required service. 20 Am. & Eng. Ency. Law (2d ed.), 19, 43; *Hunter v. Waldron*, 7 Ala. 753; *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560; *Nichols v. Coolahan*, 10 Met. 449; *Fuller v. Brown*, 11 Met. 440; *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Parker v. Macomber*, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858; *McClellan v. Harris*, 7 S. D. 447; *McDonald v. Montague*, 30 Vt. 357; *Hughes v. Toledo Scale & Cash Register Co.*, 112 Mo. App. 91, 86 S. W. 895. The court below was, therefore, in error in allowing respondent full time for the months of April, May, and June.

Respondent cites a number of cases where a recovery has been permitted because of some waiver by the master. Such cases are not in point here, as there is no waiver either alleged or proved. In fact, it appears from the correspondence of the parties that appellant had informed respondent that it was neither willing, nor was it its custom, to pay its salesman for lost time, which would seem to have been acquiesced in by respondent; as in one of his letters to the company, in which he refers to his illness, he says: "I don't

know what your system is in regard to sickness, but I am willing to stand by it."

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., GOSE, FULLERTON, and CHADWICK, JJ., concur.

[No. 8757. Department One. June 23, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Thomas B. MacMahon, Respondent*, v. INDEPENDENT TELEPHONE COMPANY, *Appellant*.[1]

TELEPHONE COMPANIES—RATES—MAXIMUM—CHARGES OF DELINQUENCY. The rule of a telephone company that its rentals shall be payable monthly in advance, and 50 cents added as a collection fee if not paid on the tenth of the month, is a reasonable rule which such a company may enforce as a public service corporation; and the fifty-cent fee is not in addition to the maximum charge allowed by its franchise, but is a reasonable regulation and charge for default and delinquency (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., Judge *pro tempore*, entered January 12, 1910, in favor of the plaintiff, granting a writ of mandamus, upon sustaining a demurrer to the answer. Reversed.

George D. Emery, for appellant.

Thomas B. MacMahon, pro se (*Winter S. Martin*, of counsel).

MORRIS, J.—Appellant operates its telephone system in Seattle under a franchise establishing rates for the different lines, and fixing the rate to be charged for a telephone on a one-party residence line at the sum of $2.50, and which concludes as follows: "The foregoing rates shall be the maxi-

[1]Reported in 109 Pac. 366.

mum rates to be charged and received for such telephones." Appellant also operates in what was formerly West Seattle, under a franchise establishing the rates to be charged under such franchise, and containing the further provision that such charges shall be paid in advance before the 10th of each month, after which time an additional charge of fifty cents may be made to cover the costs of collection.

On January 27, 1909, the relator and the appellant entered into a contract for the installation of a one-party line telephone at relator's residence, 403, 9th avenue, Seattle. The rate fixed was $2.50 per month, payable in advance at the office of the company, or on before the tenth day of each month, to which was to be added all long distance calls made over relator's telephone. It was then provided that in case the monthly advance payment was not made, an additional charge of fifty cents each month would be paid by relator as compensation for the additional cost of collecting and handling the account. There was a further provision that in case of a removal of the instrument from one location to another, relator would pay the cost of such removal. In June following, relator removed to what was formerly West Seattle (said city having become a part of the city of Seattle July 24, 1907), and upon his request the company removed his telephone to his new residence and was paid for such removal by relator. On November 17, 1909, relator requested the company to remove his telephone to 2814, Franklin avenue, Seattle, which the company refused to do until relator paid his arrears for the months of September, October, and November, amounting, including the fifty cent charge because of nonpayment in advance, to the sum of $9. Relator refused to pay such sum, and again on December 23, requested such change to be made, accompanying his request with a check for $10. This request was refused by the company, it then claiming an additional sum of $3 for the December rental. Relator then sued out this writ of

mandate, which being granted by the court below, the company appeals.

The contention of relator, and the theory upon which the court below granted the writ, is that, inasmuch as the franchise under which appellant operates in the city of Seattle provides that the rates established by such franchise, including a $2.50 monthly rate for a one-party residence line, shall be the maximum charge, the appellant is not justified in its charge of an additional fifty cents, when the regular monthly rate is not paid in advance. It will not be doubted that a telephone company has the power to establish rules and regulations for the operation and conduct of its business in a given territory, when such rules and regulations are reasonable in their requirements, and not in conflict with any provision of general law, or any special provision of the franchise under which it obtains and exercises its rights in the territory. Telephone companies, being public service corporations, are charged with certain public duties, which they may not refuse, and any rule or regulation which falls within the character above referred to which is reasonably proper and necessary to enable them to fulfill and discharge these public duties and render the public efficient service will be enforced. A rule requiring the payment of its monthly rentals in advance is a regulation of the permitted character, and so is the further regulation that, unless the service is paid for in advance, it may be denied. The company being bound to render the public efficient service, it has the right to enforce such rules as will provide for the prompt payment of its rentals, and thus provide for the securing of funds with which it may insure and protect the efficiency of its plant and keep it at such a standard as will enable it to discharge its public duties, when called upon to do so, either voluntarily at the request of the individual, or involuntarily at the command of the courts. Being a public service corporation, it is compelled to serve the individual when such service is demanded, but this does not take from it the right

to demand that the continuance of such service be conditional upon the prompt payment of a reasonable rental, which shall be sufficient to enable the company to render an efficient service to its patrons, and at the same time provide a reasonable profit for itself. This is the reasoning upon which the courts have held companies of this character justified in withdrawing their service, when their charges are not promptly paid, or where a regulation fairly and generally beneficial to the company and its patrons remains uncomplied with. *Rushville Co.-op. Tel. Co. v. Irvin*, 27 Ind. App. 62, 59 N. E. 327; *Hewlett v. Western Union Tel. Co.*, 28 Fed. 181; *McDaniel v. Faubush Tel. Co.*, 32 Ky. Law 572, 106 S. W. 825; Jones, Telegraph & Telephone Companies, §§ 341, 352.

Manifestly, if all the subscribers of appellant continuously refused to pay their rentals in advance, and thus necessitated the employment of collectors, additional office force, and the incurring of other expenses incident to the collection of such rentals, the moneys thus expended must be taken from the revenues of the company, and thus impair a fund to which the company must look for the expenditure necessary to keep its plant in the highly efficient condition required and demanded because of the public nature of the service. It is therefore not unreasonable that the company adopt a rule and enforce a regulation providing for the payment of its rentals in advance, and for an additional charge in case such requirement is not complied with. Such a charge is not an addition to the maximum rate provided for in the franchise. It is rather a charge for default and delinquency, which may be avoided by a compliance with the reasonable regulation for the payment of rentals in advance.

There is some discussion in the briefs as to whether the fifty-cent charge is in the nature of liquidated damages for the breach of contract to pay in advance, or whether it is a penalty. It is immaterial what its nature may be, and we shall not attempt to critically analyze or define it. It was a proper regulation of the company to assist in the prompt

payment of the monthly rentals, and as such a proper and reasonable regulation, it is sustained. It is not a fixed rate which must be paid to receive the service of the company, and which may not be increased from that fixed by the city in granting the franchise. It is rather in the nature of a regulation to insure the prompt payment of that fixed rate, beneficial alike to the company and its subscribers. In the case of *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. 316, 28 Pac. 516, 28 Am. St. 35, 14 L. R. A. 669, the water company refused to supply water to the hotel company unless it paid its arrears in the sum of $478.10, to which a penalty for such failure to pay was added, increasing the amount to $502; and the refusal was sustained as a proper regulative and reasonable requirement.

We have not referred to the fact that the franchise under which appellant first operated in West Seattle provides for the payment of the additional fifty cents in case the monthly rental be not paid in advance; preferring to rest our decision upon the reasons given, without deciding whether, since West Seattle became part of Seattle, the appellant's rights in that territory are to be determined by its West Seattle or its Seattle franchise.

The case comes here upon a judgment entered upon appellant's refusal to plead further, upon the court sustaining a general demurrer to the amended answer which sets forth the facts heretofore referred to. The order will be that the judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—The franchise under which the appellant operates provides that the appellant shall not charge or receive from one in respondent's situation for the rental or use of a telephone any greater rate or sum than $2.50 per month. It gives the appellant no power to impose fines or penalties, nor does it authorize the appellant to

charge the cost of collecting the rentals to the user of the phones. I am of the opinion, therefore, that the grantor of the franchise intended the amount fixed therein to be a maximum rate, covering all contingencies, the cost of collecting from subscribers, as well as the other expenses connected with the operation of the system. Hence the additional charge imposed on the respondent for delinquency, since it makes the whole charge exceed the maximum permitted by the franchise, is unwarranted.

The judgment should be affirmed.

[No. 8653. Department One. June 23, 1910.]

ELIZABETH M. HASSETT, *Appellant*, v. FRATERNAL BROTHERHOOD, *Respondent*.[1]

APPEAL—BOND—AMOUNT—DISMISSAL. A bond on appeal in the sum of $200, conditioned also as a supersedeas bond, is ineffectual to perfect the appeal, which must be dismissed.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 4, 1909, dismissing, at the close of plaintiff's case, an action upon an insurance policy, and denying a new trial, after a trial before the court and a jury. Dismissed.

Moncrieffe Cameron, for appellant.

Milo A. Root, for respondent.

PER CURIAM.—Appellant is met at the threshold of this case by a motion to dismiss her appeal. The bond is in form an appeal bond and supersedeas in the penal sum of $200, and conditioned that, "whereas the appellant desires to effect a stay of proceedings under such judgment and in this action according to law," etc. Under a long line of cases cited in

[1]Reported in 109 Pac. 305.

Washington Water Power Co. v. Abacus Ass'n, 49 Wash. 261, 94 Pac. 1072, this form of bond has been held to be ineffectual for any purpose. We are urged to overrule this line of cases as based upon purely technical grounds and as unwarranted by a correct interpretation of the statute. Rem. & Bal. Code, § 1722. However engaging such argument might have been, had the question been an original one, we feel that it has become a settled rule of practice in this state, and has been followed for more than twelve years, not only in the cases referred to in *Washington Water Power Co. v. Abacus Ass'n*, but also in many cases where no opinions have been filed. If the court erred in its original construction of the statute, it has been possible to correct it by appropriate legislation. Many sessions of the legislature have intervened since the case of *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999, but we find no expression of disapproval on its part. Considering the great number of cases which have fallen within the rule as declared, we do not see our way clear at this time to make a contrary ruling. In another case, argued on June 8, the case of *Bridge v. Calhoun, Denny & Ewing*, 57 Wash. 272, 106 Pac. 762, is cited as opposed to the rule of *Pierce v. Willeby*. Reference to the decision in that case will show that the court expressly stated that we did not find the bond so conditioned as to operate both as a supersedeas and appeal bond. Appeal dismissed.

[No. 8722. Department One. June 23, 1910.]

HENRY SWIFT, JUNIOR, *Appellant*, v. GEORGE W. SAULSBERRY, *Respondent*.[1]

APPEAL—BOND—AMOUNT—DISMISSAL. A bond on appeal in the sum of $200, conditioned also as a supersedeas bond, is ineffectual to perfect the appeal, which must be dismissed.

Appeal from a judgment of the superior court for King county, Main, J., entered February 19, 1910. Dismissed.

Charles R. Crouch, for appellant.

L. Y. Devries, for respondent.

PER CURIAM.—The appellant has moved to dismiss the appeal, for the reason that the appeal bond is not in form or substance such as to render the appeal effectual.

The point relied upon is that the bond is conditioned both as an appeal and supersedeas, and is in the penal sum of $200. The motion is granted. *Hassett v. Fraternal Brotherhood, ante* p. 161, 109 Pac. 305.

The dismissal of the appeal results in no prejudice to the appellant, as we would be required to affirm the case on the merits.

[1]Reported in 109 Pac. 305.

[No. 8606. Department Two. June 23, 1910.]

A. J. TOWNER, *Respondent*, v. P. A. BLUE *et al.*, *Appellants*.[1]

SPECIFIC PERFORMANCE—FRAUDS, STATUTE OF—PART PERFORMANCE—DILIGENCE—EVIDENCE—SUFFICIENCY. There is no such part performance of an oral contract for the purchase of land as to take the case out of the operation of the statute of frauds and entitle a vendee to specific performance, when the testimony in relation to the contract is uncertain and misty, and it appears that the vendees were not diligent in their performance of the contract, the vendees having failed to pay as agreed, but continuing to pay rent for two years and eight months, and having stated that they were unable to make the purchase.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered September 7, 1909, upon findings in favor of the plaintiff, in an action of ejectment, after a trial before the court without a jury. Affirmed.

A. L. Miller and *E. M. Green*, for appellants.

A. H. Imus and *J. E. Stone*, for respondent.

PER CURIAM.—The action was brought for ejectment. The defense was that the defendants had purchased the property involved in the proceeding of one Bogart, by oral agreement, and defendants asked for specific performance. The case was tried upon the theory that the plaintiff could not prevail if the defendants were entitled to specific performance. Otherwise, it was conceded that he should. The court found that the plaintiff was the owner of the property, and entitled to the possession, entitled to a writ of ejectment ejecting said defendants from said premises, and to an order restoring the possession of said premises to said plaintiff; that the plaintiff was entitled to judgment against the defendants in the sum of $152, the rental value of the premises detained, and for his costs and disbursements. Judgment

[1]Reported in 109 Pac. 601.

was entered accordingly, and the appeal is from such judgment.

The whole question at issue is, was there such a contract, and if so, such a performance of that contract, as would entitle the appellants to a judgment for specific performance. It is insisted by the appellants that there was such part performance on their part as would take the contract out of the operation of the statute of frauds, and we think this is true if the contract was otherwise performed as contended for by the appellants. It is also insisted by the appellants that this court held in *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424, in accordance with general authority, that a mere conflict of testimony is not of itself a sufficient ground for refusing relief, but that it is sufficient if from the whole evidence in the case the contract can be determined with reasonable certainty. This statement of the law will not be disputed, but it was also said in that case that it was a settled rule that a court of equity would not compel the specific performance of a contract in favor of one who had not been diligent in performing his own part of the contract; and applying that rule to this case, the appellants cannot prevail.

The testimony in relation to the contract is very unsatisfactory, uncertain, and misty; but the testimony in relation to the compliance on the part of the appellants with the contract is certain to the effect that they were not diligent in performing their part of the contract. We can gather from the testimony that there was some sort of an understanding or agreement between the defendant, Blue, and Bogart, the owner of the property, that the defendant was to have a right to purchase the land at a stipulated price if he concluded to do so by the next spring after the contract was made in October. While there is some conflict in the testimony in regard to this condition of the contract, we think the great weight of the testimony, as shown by the witnesses and by the circumstances surrounding the case, establishes that fact. The purchase was not made the next spring, but

the appellant continued to pay rent on the premises at fairly regular intervals, for two years and eight months after the oral agreement was entered into, making no demand for the performance of the contract until after Bogart had sold the land to the respondent. Bogart himself, respondent Towner, and a disinterested witness, Taylor, all testified that the appellant Blue had stated to them that he had given Bogart permission to sell the land as he did not wish to purchase it. In fact, the appellant Blue himself testified that he had made that statement to Mr. Bogart at one time, but afterwards reconsidered the proposition and manifested a disposition to purchase the land according to the original contract.

It cannot be said, under the weight of the testimony, that the appellants were anxious, willing, or able to comply with the conditions of the contract; and, without specially reviewing the testimony, we are abundantly satisfied that the court would not be justified in compelling a specific performance of a contract for the sale of land on an oral contract upon the character or measure of testimony produced in this case. The judgment is affirmed.

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[No. 8766. Department Two. June 24, 1910.]

JAMES B. BELCHER *et al.*, *Respondents*, v. JOHN W. KLEEB *et al.*, *Appellants*.[1]

LOGS AND LOGGING—SALE OF STANDING TIMBER—REMOVAL. Under a deed of standing timber "to be cut and removed within two years from the date hereof" the grantee has no right to remove the timber after the expiration of the time fixed.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered September 23, 1909, upon findings in favor of the plaintiffs, after a trial on the merits, in an action for an injunction. Affirmed.

[1]Reported in 109 Pac. 798.

Chas. E. Miller, for appellants.

Welsh & Welsh, for respondents.

PER CURIAM.—This action was brought to restrain the defendants from cutting and removing timber from certain real estate, and to quiet title. Judgment was entered as prayed for in the complaint. The defendants have appealed.

It appears that, on August 18, 1906, the appellant John W. Kleeb purchased "all the merchantable timber standing, being, and lying" upon the lands in controversy. The timber was conveyed by deed, which recited that it was "to be cut and removed within two years from the date hereof." The timber was not cut within the two years, and no effort was made to remove any of it until June 1, 1909. This action was thereupon brought to restrain the removal of the timber. All the questions raised in this case were presented and decided by this court in *Lehtonen v. Marysville Water & Power Co.*, 50 Wash. 359, 97 Pac. 292, and in *Allen & Nelson Mill Co. v. Vaughn*, 57 Wash. 163, 106 Pac. 622. We are satisfied with the rule stated in those cases. This case cannot be distinguished from those.

The judgment appealed from is therefore affirmed.

[No. 8813. Department Two. June 24, 1910.]

SEATTLE BREWING & MALTING COMPANY *et al.*, *Appellants*, v. AVERDALE TALLEY *et al.*, *Respondents*.[1]

DIVORCE—ALIMONY—LIEN—JUDGMENT. A money judgment in lieu of alimony and costs upon granting a divorce does not have the effect of a general judgment and is not a lien upon real estate awarded to the husband as his separate property free and clear of all claims of the wife; since there is no lien for alimony in the absence of statute or express provision in the judgment therefor.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered January 8, 1910, upon findings in favor of the defendants, after a trial on the merits, in an action to quiet title. Reversed.

Walter S. Fulton and *Stevenson & Sutton*, for appellants.

Walter D. Peters and *Jas. W. Carr*, for respondents.

MOUNT, J.—Appellants brought this action to quiet title to certain real estate, and to restrain the sheriff from a threatened sale of such real estate to satisfy an execution. On a trial of the case, judgment was rendered in favor of the defendants, and the plaintiffs have appealed.

The facts are as follows: Prior to May 1, 1909, one John P. Lacerda and respondent Averdale Talley were husband and wife. On that day, at the suit of Averdale Talley Lacerda, she was granted a divorce from her husband. The decree recited, among other things, as follows:

"It is further ordered, adjudged, and decreed that all the property rights both real and personal now standing in the name of the defendant herein be and the same are hereby declared to be his sole, separate, and individual property, free and clear of all claims of the plaintiff herein of every kind and nature whatsoever. It is further ordered, adjudged, and decreed that the defendant herein be and he is hereby required to pay the plaintiff herein the sum of six hundred

[1]Reported in 109 Pac. 600.

dollars ($600), in lieu of all claims for alimony and costs in this action of said plaintiff, and transfer to her all the household furniture now owned by the parties hereto. It is further ordered, adjudged, and decreed that the said plaintiff have restored to her, and shall have hereafter the right to assume and use, her maiden name, that of Averdale Talley."

The title to the real estate in question then stood in the name of John P. Lacerda. Thereafter on May 13, 1909, he sold the real estate to the plaintiff Seattle Brewing & Malting Company, for a valuable consideration. A deed passed, and was recorded on May 20, 1909. Thereafter on the 27th day of May, 1909, the Seattle Brewing & Malting Company entered into a contract, agreeing to sell the real estate to Andrew J. Ruffner. On June 16, 1909, Averdale Talley caused an execution to be issued upon the judgment for $600 in the divorce case, and this execution was by the sheriff levied upon the real estate in question, and the sheriff was proceeding to sell the same to satisfy the said judgment.

The question in the case is whether this award of $600 in the decree of divorce is a lien upon this property. It is plain that it was not made so by the decree of divorce, for that decree recites "that all the property rights both real and personal now standing in the name of the defendant herein be and the same are hereby declared to be his sole, separate, and individual property *free and clear from all claims of the plaintiff herein of every kind and nature whatsoever.*" This language is not susceptible of the construction that the sum of $600 in lieu of all claims for alimony is made a lien on said property, for it expressly states that such property is free and clear from all claims of the plaintiff. We have several times held that the court in a divorce case may make an award of alimony, or an award in lieu of alimony, a lien upon the property of the defendant. *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *In re Cave*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736; *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842.

The general rule seems to be that a "decree for alimony creates no lien upon the estate of the husband, in the absence of statutes so providing, unless the decree fastens it upon some particular property. It is a personal charge upon the husband rather than upon his estate." 2 Am. & Eng. Ency. Law (2d ed.), p. 133. The statutes of this state do not make a decree for alimony a lien upon real estate. In *King v. Miller*, *supra*, we said:

"Ordinarily a decree of divorce between the parties puts their property matters at rest, and should do so, but in this case an express lien was created upon the real estate in controversy for the purpose of securing the monthly allowance which was made";

thus recognizing the general rule, and also that an award of alimony may be made a lien by express order and not otherwise. In view of this rule, it follows that, if the court in the divorce case had intended to make the award of $600 in lieu of alimony a lien upon the defendant's real estate in that case, some order to that effect would have been made.

It is argued by respondent that this award of $600 in lieu of alimony is, in effect, a general judgment, and therefore became a lien upon the defendant's real estate under the statutes relating to such judgments, even though the same was not expressly made a lien by the decree. There would be some force in this argument if the court, at the time of rendering the decree, had not specifically declared that the real estate standing in the name of the defendant is "hereby declared to be his sole and separate and individual property free and clear from all claims of the plaintiff herein of every kind and nature whatsoever." If the court in that case had power to make the decree for alimony, or an award in lieu of alimony, a lien upon the real estate, which we have seen is the rule, then it follows that the court also had power to declare that such award should not be a lien upon the real estate. This latter was done. The respondent was not thereby deterred from collecting her award, because we have

held that such awards may be enforced by attachment against the person. *In re Cave, supra.* It is clear, therefore, that the decree in the divorce case did not make the award of $600 a lien upon the defendant's real estate, but instead thereof freed such real estate from the lien.

The judgment appealed from must therefore be reversed, and the cause remanded for a decree restraining the respondents from enforcing the execution against the real estate in question.

RUDKIN, C. J., PARKER, and DUNBAR, JJ., concur.

[No. 8846. Department Two. June 24, 1910.]

E. J. DUHAMEL *et al.*, *Appellants*, v. PORT ANGELES STONE COMPANY *et al.*, *Respondents*.[1]

SALES—CONTRACTS—CONSTRUCTION—DELIVERY—"REQUIRE." A contract for the sale of stone of varying thickness and dimensions according to plans and specifications, to be delivered in such quantities as may be "required" not exceeding a specified limit, is not breached by the vendor for want of delivery, where no demand was made specifying the dimensions of the stone; "require" in this instance meaning demanded as of right rather than needed.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 11, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Million & Houser, for appellants.

Frank A. Noble and *McClure & McClure*, for respondents.

PARKER, J.—By this action the plaintiffs seek to recover from the defendants damages claimed to have resulted from a failure of the Port Angeles Stone Company to furnish stone for the construction of the United States Post Office

[1]Reported in 109 Pac. 597.

building, in Seattle, in compliance with a contract between the Port Angeles Stone Company and plaintiffs, the latter having the contract for the construction of the building for the United States. The case was tried by the court without a jury, and resulted in findings and judgment in favor of the defendants. The plaintiffs have appealed.

The facts found by the learned trial court, so far as we deem it necessary to notice them, are, in substance, the following: The contract here involved, among other things, provides:

"This indenture made and entered into this 8th day of March, A. D. 1905, by and between the Port Angeles Stone Co., a corporation, party of the first part, and E. J. Duhamel and John Megrath, copartners as Megrath and Duhamel, parties of the second part, Witnesseth:

"Whereas, The parties of the second part have heretofore entered into a contract with the United States Government for the erection and completion of the United States custom house, court house and Postoffice building, in the city of Seattle, and are now engaged in the performance of said contract; and

"Whereas, Under said contract and the specifications for said building as now existing, Chuckanut sandstone is now specified and required for the exterior of all the walls of the building above the granite base, but the party of the second part is endeavoring to obtain a change in said specifications, by which Port Angeles stone, quarried from quarries owned by the parties of the first part, will be substituted for said Chuckanut stone.

"Now Therefore, The party of the first part hereby covenants and agrees to and with the parties of the second part that if said change in said specifications shall be made, it will sell and deliver to the parties of the second part all stone required for the erection and full completion of the exterior of all of the walls of said building above the granite base, as shall be required by the specifications for the erection and construction of said building, being all of the material now shown on said plans and specified in said specifications as now existing as Chuckanut sandstone.

"The said plans and specifications for the said building as now existing and as the same may be hereafter changed and

modified, are hereby declared to be a part of this contract, and in all respects binding upon the party of the first part.

"All of the stone must be delivered on scows or boats at Port Angeles in such quantities as may be required, not to exceed five hundred cubic feet per day. The stone to be equal in all respects to the samples furnished and submitted to the Treasury Department at Washington, and to the satisfaction of the supervising architect.

"The party of the first part shall begin to deliver said stone within thirty days of notice from parties of the second part that the stone has been accepted for said building, and the party of the first part shall continue the delivery of said stone in such quantities as required by the parties of the second part, not exceeding five hundred cubic feet per day, so as to cause no delay in the prosecution of the work of the building. . . ."

On March 9, 1905, in pursuance of the terms of this contract, the Port Angeles Stone Company gave to appellants a bond securing the faithful performance of the contract with the respondent United States Fidelity and Guaranty Company as surety thereon. Thereafter the United States consented to the change in the specifications of the building contract, by which Port Angeles stone was substituted for Chuckanut stone, and on April 5, 1905, appellants duly notified the Port Angeles Stone Company of such change, the contract thereby becoming effective. Immediately thereafter, and until August 4, 1905, the Port Angeles Stone Company kept a large force of men continuously at work at its quarry opening and developing the same. In order that the Port Angeles Stone Company might from time to time comply with the contract it was necessary that the appellants should furnish it with orders specifying the quantities of stone required and the dimensions thereof. The appellants did not require of the Port Angeles Stone Company the shipment or delivery of any stone as provided by the terms of the contract.

On August 1, 1905, appellants entered into a contract with the Chuckanut Stone Company, by which they agreed to purchase from that company stone to be used in the construction

of the building providing the substitution of Chuckanut stone for Port Angeles stone would be consented to by the United States. This change was consented to by the United States, and the building was finally constructed with that stone. The appellants kept the Port Angeles Stone Company in ignorance of their negotiations with the Chuckanut Stone Company, and encouraged the Port Angeles Stone Company to believe that its stone would be used in the construction of the building if there was a reasonable prospect that its quarry could supply stone of sufficient quality and quantity therefor; and there is no satisfactory proof that there was not such reasonable prospect. The Port Angeles Stone Company did not refuse to perform any of the obligations imposed upon it by the terms of the contract. On August 4, 1905, appellants served upon the Port Angeles Stone Company a written notice claiming it was in default under the contract, and that it had failed to deliver stone as agreed, also notifying it, "that because of said default, we will be compelled to purchase stone for the building elsewhere; and you are further notified that because of the facts aforesaid, we hereby terminate said contract, and will hold you responsible in damages (and your surety likewise to the extent of the penalty named in the bond) for such damages as we have suffered and may suffer because of such default, including any greater expense to which we may be put in procuring stone for the building elsewhere." No previous notice of the appellants' intention to terminate the contract was given to the Port Angeles Stone Company. Appellants' claim of damages is based upon the alleged failure of the Port Angeles Stone Company to deliver the stone.

The controlling questions in the case arise upon exceptions to certain findings made by the court, and exceptions to the refusal of the court to make certain requested findings. These all bear upon the general question, Did the Port Angeles Stone Company violate the terms of its contract in not delivering stone prior to August 4, 1905, when it was notified

by appellants of their intention to terminate the contract? If this question is answered in the negative the whole controversy will be disposed of.

It is contended in behalf of the respondents that, under the terms of the contract, the Port Angeles Stone Company was not required to furnish or deliver any stone except upon receiving orders or requisitions therefor from appellants from time to time, specifying the quantities and dimensions of stone required, and that no such orders or requisitions were ever given. On the other hand, it is contended in behalf of appellants, that they did make repeated demands for stone, and that in any event they were not required to give orders or requisitions from time to time as contended by respondents in order to obligate the Port Angeles Stone Company to deliver stone. These contentions present two questions: (1) What demand for stone was made, if any? (2) What demand was necessary under the contract? We will notice these in order.

From a careful reading of the evidence it seems clear to us that appellants never at any time made any order or requisition upon the Port Angeles Stone Company to deliver stone of any particular quantity or of any particular dimensions. The evidence is somewhat in conflict as to appellants making demand of a general nature for the delivery of stone. Mr. Burroughs, the secretary and treasurer of the Port Angeles Stone Company, testified:

"We were urged to get stone as quickly as we could, but admonished not to send any stone until we were positive that we had plenty of stone in sight to complete the building. Q. Who said so? A. Mr. Duhamel. He explained that the reason for that was that if he should start building with our stone and would get it part of the ways up and was not able to complete the building, it would be a disastrous thing for him and us."

At the time of and for a short time following the making of the contract, there seemed to be a possibility of the quarry not being able to furnish stone sufficient in quantity and

quality; it being not very fully developed. This explains the statement of Mr. Burroughs above quoted. It is claimed by respondents that the demands of appellants for the delivery of stone were never more specific than this, and that such demands were all thus qualified. The trial court evidently adopted this view and we think the evidence was such as to fully warrant the court in so doing.

Was the Port Angeles Stone Company bound to deliver any stone except upon demands and requisitions to be made upon it by appellants from time to time, specifying quantities and dimensions they desired? We have seen that the contract provides that,

"All of the stone must be delivered on scows or boats at Port Angeles in such quantities as may be required not to exceed 500 cubic feet per day. . . . The party of the first part shall . . . continue the delivery of said stone in such quantities as required by the parties of the second part."

Looking to the provisions of the contract, unaided by extrinsic evidence, the question of the Port Angeles Stone Company's obligation to make deliveries depends upon the meaning of the word "required" as here used. The word "require" is defined by the Standard Dictionary as follows: "(1) To demand, or to request something of, authoritatively; ask as of right; claim; insist upon; (2) To have imperative need of; render or find indispensable; want." In the case of *Brewster v. Brewster*, 52 N. H. 52, 58, the court observed:

"The verb 'require' is not absolutely the synonym of the verb 'need,' though it is of the verb 'demand.' Crabb's Synonyms, 228. Although the verb *require* may, undoubtedly, be properly used in the sense of the verb *need*, such is not its primary nor its usual signification. It comes from the Latin *requiro*, compounded of *re* and *quoero*—to seek for, or to seek to get back. It means, according to all lexicographers, and in very common parlance, to *demand;* or, as Webster defines it, to ask as of right and by authority."

In that case the word was used in an instrument providing for the payment of interest upon a certain sum to a certain

person during her life. The instrument also providing, "The principal to be paid to her when she may require it." The following authorities support the view that "require" as here used means demand or request rather than merely need. *McReynold's Appeal*, 66 Pa. St. 102; *Meagher v. Van Zant*, 18 Nev. 230, 2 Pac. 57; *People v. Central Pac. R. Co.*, 76 Cal. 29, 18 Pac. 90; *United States v. Dimmick*, 112 Fed. 350; *Hanson v. Maverick Oil Co.*, 67 N. H. 201, 29 Atl. 459; *Allen v. Allen*, 116 Iowa 697, 88 N. W. 1091.

The circumstances surrounding the making of this contract, showing the manner in which the parties contemplated this stone should be furnished, also lends support to this view. It is apparent from the evidence that this stone was to be sawed into varying thickness according to the dimensions provided in the building specifications; that is, the Port Angeles Stone Company was to prepare the stone at its quarry, and deliver it, in varying thickness and dimensions. Among other things testified to by Mr. Burroughs is the following:

"Q. State what is the fact in regard to your receiving any of such orders or directions to deliver any stone at all. A. We never received any instructions to deliver any stone—never an order. Do you want me to say anything further? Q. Not unless it will be in answer to the question— A. (Continuing) The only matter taken up whatever regarding that was soon after the contract was signed, while I was at the office of Megrath & Duhamel, Mr. Duhamel told me to go into the back room of his office with Mr. McAllister and go over the plans, and get an understanding as to the plans. Mr. McAllister then stated that whenever he should call for course A or course B and so forth, we would understand from that practically what he wanted, and at that time he gave me to understand what course A and B meant, and how we would understand whether the stone for that course was to be sawed across the bed or with the bed."

Certain testimony given by Mr. Duhamel relating to the dimensions of stone to be delivered is not inconsistent with this. Mr. Burroughs also testified that no plans were fur-

nished the Port Angeles Stone Company by appellants. We think, under the terms of the contract and all of the circumstances shown, the learned trial court was warranted in concluding that the Port Angeles Stone Company was not obligated to deliver stone except upon orders or requisitions from the appellants specifying quantities and dimensions required, and that appellants never gave such orders or requisitions prior to giving notice of their intention to terminate the contract; and that therefore the Port Angeles Stone Company did not fail or refuse to perform any of its obligations under the agreement.

We are of the opinion that the cause was rightly determined. The judgment is affirmed.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8614. Department Two. June 24, 1910.]

K. GOTTSTEIN, *Respondent*, v. GEORGE SIMMONS, *Appellant*.[1]

NEGOTIABLE INSTRUMENTS—ACTION—BY INDORSEE—DEFENSES—FRAUD—HOLDER IN DUE COURSE—BURDEN OF PROOF. In an action by an indorsee of a note given for the purchase price of fixtures, evidence that the maker procured the note by fraud and removed and refused to deliver the fixtures, and that when the note was presented by a bank for payment after maturity, it did not have any indorsements thereon, is sufficient to put the plaintiff upon proof that he was a holder in good faith before maturity.

APPEAL—RECORD—PRESERVATION OF GROUNDS—EXCEPTIONS. An exception to the direction of a verdict is sufficiently shown where the statement of facts shows the making and granting of the motion, and the clerk's journal entry recites that the motion was granted and exception allowed.

SAME—EXCEPTION—WRITTEN ORDERS. Under Rem. & Bal. Code, § 382, it is not necessary to take an exception to the direction of a verdict where the order was embodied in a written journal entry.

[1]Reported in 109 Pac. 596.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, by direction of the court, in an action upon a promissory note. Reversed.

Aust & Terhune, for appellant.

Leopold M. Stern (*J. W. Russell*, of counsel), for respondent.

PARKER, J.—This is an action upon a promissory note. The defense is based upon alleged fraud in the procuring of the note and failure of consideration. At the close of defendant's evidence offered in support of his affirmative defense, the court, upon motion of counsel for plaintiff, directed the jury to render a verdict in plaintiff's favor. Verdict and judgment were entered accordingly, and upon the denial of defendant's motion for a new trial, he appealed to this court.

The complaint is in usual form and alleges:

"That said promissory note is in words and figures as follows, to wit:

"'$400.00 Seattle, Wn., Nov. 23, 1908 30 days after date I promise to pay to the order of A. Gottstein four hundred dollars at his office. Value received. Due 12, 23, 08. George Simmons.'

"That the said note was, by endorsement of the payee, A. Gottstein, transferred to one J. Seigel.

"That the said note was, by the endorsement of the said J. Seigel, transferred to the plaintiff.

"That the plaintiff is now the holder and owner of said note."

The answer admits the making of the note; and as an affirmative defense alleges, in substance, that on the 23d day of November, the date of the note, one L. I. Hoffman falsely, and with intent to cheat and defraud defendant, represented to defendant that he was the owner of the Novelty Skirt Manufacturing Company, and of the location, lease, furnishings and fixtures of the store occupied by it in Se-

attle; that defendant, relying upon such representations and believing them to be true, did on that day agree to purchase from Hoffman, and Hoffman then and there agreed to sell and deliver to defendant, the location, lease, and fixtures in said store, for the sum of $500, $100 in cash, and the balance of $400 to be paid in thirty days; that relying upon such representation, defendant gave to Hoffman his check in the sum of $100, and signed and delivered to Hoffman the note sued upon, said Hoffman agreeing to vacate the store immediately and give defendant possession thereof together with the fixtures; that, with intent to cheat and defraud defendant, Hoffman caused said note to be made payable to the order of A. Gottstein, with full knowledge and consent of Gottstein, and without any consideration moving from Gottstein to appellant; that on the same day, in violation of said agreement, and in furtherance of his intention to cheat and defraud defendant, Hoffman removed from said store the fixtures and furnishings so agreed to be sold; that about the 25th day of November, 1908, a petition in bankruptcy was filed against said Novelty Skirt Manufacturing Company, and it was thereafter duly adjudged a bankrupt; that neither Hoffman nor Gottstein have ever returned any of said fixtures to appellant; that the reasonable value of the fixtures so removed is $400; that after the date of the maturity of the note, it was transferred by Gottstein without consideration to J. Seigel, who took the same with notice of all the facts alleged; and that thereafter Seigel without consideration transferred the note to plaintiff, who took the same with notice of all the facts alleged. These affirmative allegations are denied by the reply.

The learned trial court having ruled that, under the issues, the burden of proof was upon the defendant, his counsel excepted to the ruling and introduced evidence in support of the affirmative defense. Without attempting to review this evidence in detail, it is sufficient to say that it was, in our opinion, ample, if believed by the jury, to warrant the con-

clusion that the note was procured by fraudulent representations, and that at least almost the whole of the consideration for which it was given was fraudulently withheld from appellant. Appellant also testified that, about the 26th or 28th day of December, after maturity of the note, it was presented to him for payment by a messenger of the Puget Sound National Bank; that appellant then looked at the note both upon its face and back, and that it had no endorsements thereon indicating a transfer. There was no evidence offered as to either Seigel or the respondent having knowledge of the alleged fraudulent acts in connection with the making of the note. Respondent offered no evidence whatever, but moved the court for a directed verdict in his favor, which after argument of counsel was granted. This, it is contended by counsel for appellant, was erroneous, and is the principal error relied upon for reversal.

We are of the opinion that the learned trial court committed an error in taking the case from the jury, especially in view of the evidence tending to show that the note was not transferred to either Seigel or respondent until after maturity; and even assuming that the evidence was not sufficient to warrant the conclusion that it was transferred after maturity, still appellant, having made sufficient showing of fraud and failure of consideration attending the giving of the note to entitle him to have those questions submitted to the jury, he was not required to go further in order to make a *prima facie* case. If his evidence was sufficient to induce the jury to find for him upon these questions, and the respondent offered no evidence to show transfer of the note before maturity and his good faith in acquiring it, then appellant would be entitled to a verdict in his favor. *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *City Nat. Bank v. Mason*, 58 Wash. 492, 108 Pac. 1071.

Learned counsel for respondent contends that appellant is not entitled to have the alleged error of the court in directing

a verdict reviewed here because such action of the court was not duly excepted to. It is true the statement of facts does not show a formal exception to the court's order directing the verdict. It does show, however, the making of the motion, argument of counsel and granting of the motion; and the record of the trial entered by the clerk in the journal, after referring to the motion, proceeds, "Motion granted and exception allowed. Whereupon the jury brought in the following verdict, to wit: . . ." This we think shows a sufficient exception, even conceding an exception was necessary. We think, however, it was not necessary in view of section 382, Rem. & Bal. Code, the order being embodied in a written journal entry.

We find no other prejudicial error in the record likely to occur upon a new trial. The judgment is reversed, with directions to grant appellant's motion for a new trial.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8550. Department Two. June 24, 1910.]

EDWARD H. HAMLIN, *Respondent*, v. JAMES W. HAMLIN *et al.*, *Appellants*.[1]

GIFTS—CAUSA MORTIS—DELIVERY—WILLS—TESTAMENTARY DISPOSITION—TRUSTS. Where one in feeble health delivered a written assignment of a note and mortgage to the assignee, or a third person, in trust for a son and stepson, and never thereafter had any dominion or control over the same, there was a sufficient delivery to consummate a gift *casua mortis*, and the same is not void as an irregular testamentary disposition of the property.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 19, 1909, upon findings in favor of the plaintiff, after a trial before the court, in an action in equity. Affirmed.

[1]Reported in 109 Pac. 362.

Frank S. Griffith, for appellants.

McClure & McClure, for respondent.

Crow, J.—This action was commenced by Edward H. Hamlin against James W. Hamlin, Mrs. S. A. Hanna, Frank R. Atkins, and Mary C. Atkins, his wife, to establish a trust and recover plaintiff's interest therein. In 1876 William H. Hamlin and Marie Hamlin, both now deceased, were intermarried in this state. William H. Hamlin had, by a former marriage, one son, the defendant James W. Hamlin, and Marie Hamlin had, by a former marriage, one son, the plaintiff, who adopted the name of Hamlin. William H. and Marie Hamlin acquired considerable land in Snohomish county as their community property. On July 13, 1899, Marie Hamlin conveyed all of this land except one tract known as lot 3, to her husband by warranty deed, in consideration of love and affection. The plaintiff alleged that Marie Hamlin was then in feeble health; that her deed, absolute in form, was in fact made to William H. Hamlin in trust, he to have use, possession, and right to sell during his lifetime for his maintenance and support, and the remainder of the land, with the proceeds, issues and profits thereof, to be given at his death, one-half to the defendant James W. Hamlin and one-half to plaintiff; that Marie Hamlin died on October 8, 1890; that William H. Hamlin accepted the trust, entered into possession and acquired other lands with the rents, issues and profits; that he from time to time disposed of portions of the land so held in trust by him; that prior to January 10, 1906, he conveyed other portions to one John W. Lyke, as security for a loan; that on January 10, 1906, he, by John W. Lyke as his attorney in fact, contracted to sell to the defendant Frank R. Atkins certain of the land, including said lot 3; that plaintiff, at William H. Hamlin's request, conveyed his interest in lot 3 to John W. Lyke, it being then agreed that $2,300, with interest from March 27, 1906, should be paid to him by William H. Ham-

lin out of the proceeds of the sale, and that all of the remainder of the lands theretofore conveyed by Marie Hamlin, with the proceeds thereof, should be held in trust by William H. Hamlin for the plaintiff and the defendant James W. Hamlin, share and share alike, and that all of William H. Hamlin's estate remaining at his death, after payment of plaintiff's $2,300 note, should be equally apportioned to plaintiff and James W. Hamlin; that on April 6, 1906, John W. Lyke and wife, at William H. Hamlin's request, conveyed the title to the real estate held by John W. Lyke to the defendant Frank R. Atkins, who paid $11,182.50 in cash therefor, and with his wife, Mary C. Atkins, executed and delivered to John W. Lyke their note for $10,117.50, secured by mortgage on the real estate conveyed, and that John W. Lyke thereafter transferred said note and mortgage to William H. Hamlin. The plaintiff further alleged:

"(15) That thereafter and on to wit, the 18th day of November, A. D. 1907, being then mortally sick and in contemplation of death, Wm. H. Hamlin did assign, transfer and set over unto the defendant S. A. Hanna the said promissory note dated April 3, 1906, made by the said Frank R. Atkins and Mary Churchill Atkins, his wife, together with the mortgage securing the same hereinabove described and mentioned and did by his deed of warranty in writing convey and warrant to the defendant S. A. Hanna that portion of said above described real estate held by the said Wm. H. Hamlin in trust, as aforesaid, and particularly described as follows, to wit: (description).

"(16) That the assignment of said note and of said mortgage and the conveyance of said land to the said S. A. Hanna were so made by the said Wm. H. Hamlin in trust that the said S. A. Hanna should collect the principal and interest due and to become due upon said promissory note hereinabove mentioned and made by the said Frank R. Atkins and Mary Churchill Atkins, his wife, to the said John W. Lyke and by the said John W. Lyke assigned to the said Wm. H. Hamlin and to apply, divide and distribute the proceeds of said note and said land as follows: (1) That the said S. A. Hanna should pay to herself a reasonable compensation for administering said trust. (2) That the said S. A.

Hanna should pay therefrom to plaintiff the said sum of twenty-three hundred dollars ($2,300) and interest above mentioned. (3) That the said S. A. Hanna should divide all the rest, residue and remainder of said trust estate between the plaintiff and the defendant, James W. Hamlin.

"(17) That thereafter and on or about the first day of December, 1907, the said Wm. H. Hamlin died intestate leaving surviving him no wife and no child or children other than the said James W. Hamlin.

"(18) That the said S. A. Hanna accepted said trust and took possession of all of the property of every kind and nature left by the said Wm. H. Hamlin and all of which was held by the said Wm. H. Hamlin as trustee, as hereinabove alleged, including the promissory note, mortgage and real estate mentioned and described in paragraph 15 hereof and ever since has held, and does now hold, and possess the same, in trust for the purposes above alleged and not otherwise.

"(19) That the said S. A. Hanna does now deny that she holds said property in trust for this plaintiff in any particular or to any extent other than to pay to this plaintiff the said sum of twenty-three hundred dollars ($2,300) and interest and has refused, and does now refuse, to acknowledge the right of plaintiff to any right, title, or interest, in, or to, said note, mortgage and lands, or any part thereof, and that the said S. A. Hanna is threatening to, and will, as plaintiff believes, collect the amount now due upon said note, and that she will pay over the whole of the proceeds thereof to the said James W. Hamlin excepting only the said sum of twenty-three hundred dollars ($2,300) and interest."

In addition to other equitable relief, plaintiff asked that S. A. Hanna be decreed a trustee; that her reasonable expenses be ascertained and paid; that she be directed to pay plaintiff's $2,300 note; and that the remainder of the money to be collected by her on the Atkins note, and all of the real estate conveyed to her be transferred to plaintiff and James W. Hamlin share and share alike. James W. Hamlin and Mrs. S. A. Hanna answered separately. The defendant James W. Hamlin, with other affirmative defenses, alleged that Marie Hamlin never made or executed any writing whereby she imposed any trust upon the real estate conveyed

by her, and that any trust claimed by plaintiff to have been imposed on any of the real estate is an express trust resting in parol only. This allegation being admitted, the plaintiff, on the trial, abandoned any attempt to establish any express trust imposed upon the land, but asserted the trust which he alleged had been imposed upon the personal property by William H. Hamlin immediately prior to and in contemplation of his death.

The trial court found that the Atkins note and mortgage were executed and delivered as alleged; that $8,941.50 was due thereon, with interest from April 3, 1906; that John W. Lyke sold and transferred them to William H. Hamlin; that on March 27, 1906, William H. Hamlin executed and delivered to plaintiff his note for $2,300; that on November 18, 1907, William H. Hamlin assigned and transferred the Atkins note and mortgage in trust to S. A. Hanna, who was to collect the same and pay $1,000 to herself, $2,300 and interest to the plaintiff on the note held by him, and pay to the plaintiff and James W. Hamlin equally the remainder thereof; that William H. Hamlin died on December 22, 1907; that S. A. Hanna accepted said trust, but has since repudiated the same, refusing to pay the plaintiff any sum other than the $2,300 note; that $10,276.72 was due on the Atkins note; that $1,000 should be paid to S. A. Hanna; that $2,783.75 due on plaintiff's $2,300 note should be paid him, and that the remainder of the $10,276.72 should be equally divided between the plaintiff and James W. Hamlin. Judgment was entered in plaintiff's favor for $6,030.23, against S. A. Hanna, Frank R. Atkins, and Mary C. Atkins, and against all defendants, for costs. The defendants have appealed.

The appellants contend that the findings are not sustained by the evidence. The testimony of S. A. Hanna was given by deposition. All of the other witnesses testified in court. The evidence was in conflict. The trial judge saw all of the witnesses except S. A. Hanna, heard them testify, and passed

upon their credibility, and we are unable to conclude after a careful reading of the record that his findings should be disturbed.

The appellants contend that the written assignment of the Atkins note and mortgage to Mrs. Hanna was an attempted testamentary disposition of his property by William H. Hamlin, not executed with the formality required in the execution of a will, and therefore void. The note, mortgage, and assignment were delivered either to S. A. Hanna or one W. H. Schumacher by William H. Hamlin, who never had possession of or control over them at any time thereafter. They were recorded immediately after his death, and it appeared that Mrs. S. A. Hanna acknowledged the creation and existence of the trust of which she was trustee; but denied that she was to pay any money to the respondent other than his $2,300 note. The contention that the assignment was an attempted testamentary disposition of his property by William H. Hamlin is not sustained by the evidence.

The appellants further insist that the evidence was not sufficient to establish any trust. In their brief they review the evidence at length in an attempt to sustain this contention. Without repeating the evidence in this opinion, we conclude that it was sufficient to establish the fact that the assignment, note, and mortgage completely passed from William H. Hamlin's dominion and control during his lifetime, when he executed the assignment, and that the trust was imposed by him. The difficulty with the appellants' present contention is that they tried their cause on one theory in the superior court, and now attempt to present it on another and inconsistent theory here. In the superior court they proceeded upon the theory that S. A. Hanna had been made a trustee by William H. Hamlin, and that she thus took title to the note and mortgage. The only substantial controversy on the trial was as to the terms and conditions of the trust, the respondent there contending that he was to receive one-half of the proceeds of the Atkins note and mortgage after

the payment of his $2,300 note and $1,000 to Mrs. Hanna; and the appellants, although admitting that Mrs. Hanna was to pay plaintiff's note, vigorously contending that, after its payment and the payment of $1,000 to Mrs. Hanna, James W. Hamlin was to be the only beneficiary of the trust. The appellant S. A. Hanna, in her answer, pleaded the trust as she understood it, and in her deposition testified to its creation. All of the appellants requested the trial court to make the following finding:

"That on said 18th day of November, 1907, the said William H. Hamlin did sell, assign and set over unto one S. A. Hanna the said note and mortgage in trust that the said S. A. Hanna should collect said note and mortgage and from the proceeds should pay:

"(1) To pay all bills and expenses owing by the said William H. Hamlin.

"(2) To pay to the said S. A. Hanna $1,000.

"(3) The said S. A. Hanna should pay all expenses that she might be put to by reason of said trust.

"(4) That S. A. Hanna was to pay E. H. Hamlin a note held by him in the sum of $2,300 when he, said Hamlin, gave Mr. Everton a quit claim deed to Everton's property.

"The balance of said money was to be given to his son James W. Hamlin."

Appellants now take the position that the transfer from William H. Hamlin to S. A. Hanna was a nonconsummated gift, *causa mortis;* that title to the note and mortgage never passed to her; that they were deposited and remained with W. H. Schumacher, subject to the dominion and control of William H. Hamlin, who made no disposition of them at any time prior to his decease; that Schumacher was an agent of William H. Hamlin and that the agency was terminated by the death of the principal. This position, that no completed delivery was made, is inconsistent with that taken by appellants upon the trial; as they then admitted, or at least failed to dispute, the completed transfer and delivery of the note and mortgage to Mrs. Hanna in trust. In any event, we think that, in the absence of evidence to the contrary, the

deposit of the note and mortgage and assignment with Schumacher by William H. Hamlin was a complete delivery in law; that the circumstances as detailed by the evidence show loss of dominion and control by William H. Hamlin; that Schumacher was appointed agent for Mrs. Hanna by William H. Hamlin, and that delivery to him was a complete delivery to her.

"Gifts *causa mortis* cannot be consummated by mere parol. There can be no such gift without an intention to give and a delivery, either actual or constructive, of the thing given. . . . the donor must part with all dominion over the property, so that no further act is required of him or his personal representative, to vest the title perfectly in the donee, if it be not reclaimed by the donor during his life. If the possession of the donee does not continue the gift is at an end. He must take and retain possession until the donor's death. It is well settled that the delivery need not be made to the donee personally, but may be made to another as his agent or trustee, and that without his knowledge at the time of making the gift. This is essentially a delivery, not to an agent of the donor, but to a trustee for the donee. So also a gift providing for a division of the property among specified persons after the payment of bills and funeral expenses is a valid gift *causa mortis*." 20 Cyc. 1231-1233.

See, also, *Devol v. Dye*, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; *Varley v. Sims*, 100 Minn. 331, 111 N. W. 269, 117 Am. St. 694, 8 L. R. A. (N. S.) 828. In *In re Estate of Podhajsky*, 137 Iowa 742, 115 N. W. 590, the court said:

"It will not be disputed that it is entirely competent for a person, either by a duly acknowledged written instrument or even by parol, to turn over personal property, moneys, securities or choses in action into the hands of another, to be held and used for the benefit of some designated beneficiary, and that, when this is done, such beneficiary obtains an immediate and vested interest in the subject of the trust, which the trustor cannot revoke or disaffirm unless such power of revocation has been reserved in express terms at the time the trust was created. . . . Even a gift *causa mortis* may be effected by delivery to a third person in trust for the donee,

although the gift does not come to the knowledge of the donee, and is not accepted by him, until after the death of the donor. The acts of the trustee or third person receiving the property for the benefit of the donee are deemed to be in the interest of the latter, and the acceptance of the gift is presumed."

Our conclusion is that a complete delivery was made; that W. H. Hamlin lost all dominion and control over the property; that Mrs. S. A. Hanna was made a trustee; that the trust created was as adjudged by the trial court; that the judgment is right, and that it should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8512. Department One. June 27, 1910.]

R. W. STARR, *Appellant*, v. LONG JIM *et al.*, *Respondents*.[1]

APPEAL—REVIEW—SECOND APPEAL—LAW OF CASE. Upon a second appeal, the supreme court cannot reconsider the questions determined on the former appeal.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered June 12, 1909, in favor of the defendants, in an action to quiet title, after a hearing before the court without a jury. Affirmed.

Reeves & Reeves and *R. W. Starr*, for appellant.

PER CURIAM.—On a former appeal of this case the judgment was reversed, and the cause remanded to the court below with directions to enter judgment in favor of the defendants in accordance with the prayer of their answer, upon the payment of certain sums to be ascertained and fixed by that court. *Starr v. Long Jim*, 52 Wash. 138, 100 Pac. 194. A further hearing was had after the cause was remanded, and

[1]Reported in 109 Pac. 810.

a second and final judgment was entered in accordance with the mandate of this court. From the latter judgment, this appeal is prosecuted.

No error is assigned upon any ruling or decision of the court on the second hearing, and we have neither the right nor the disposition to reconsider the questions determined here on the former appeal.

The judgment is therefore affirmed.

[No. 7334. Department Two. June 27, 1910.]

PORTLAND AND SEATTLE RAILWAY COMPANY, *Respondent*, v. SKAMANIA BOOM COMPANY, *Appellant*.[1]

APPEAL—REMAND—VACATING SUPERSEDEAS ON CERTIORARI—EFFECT—REMITTITUR. Where, upon affirmance of an order adjudging a public use in a condemnation case, the supreme court vacated the supersedeas granted at the time of allowing the writ of review, the lower court may proceed with the trial without waiting for the remittitur from the supreme court.

APPEAL—REVIEW — HARMLESS ERROR — COURTS — ORDER OUTSIDE COUNTY. Error, if any, in setting a cause for trial by an order made outside of the county in which the action is pending is harmless where the party had notice and a fair trial.

EMINENT DOMAIN—PROCEEDING—ASSESSMENT OF DAMAGES. Where the full title to land had been condemned for a railroad right of way, the owner is not entitled, in proceedings to assess damages, to have the company produce the plans for the construction of the roadbed.

EMINENT DOMAIN—DAMAGES—EXPERT WITNESSES—COMPETENCY. Where there was an issue as to whether land condemned was more valuable for farming purposes or for booming purposes, it is proper to overrule an objection to the competency of two witnesses who were farmers and competent to testify as to its value for agricultural purposes.

SAME—EVIDENCE—MATERIALITY. Upon an issue as to the value of land condemned for a railroad right of way, the company should not be required to produce the plans for a bridge which was not on the land in controversy.

[1]Reported in 109 Pac. 814.

SAME—APPEAL—REVIEW—VERDICT. The award of a jury in a condemnation proceeding well within the extremes of conflicting evidence, after a view of the premises, is conclusive on appeal.

Appeal from a judgment of the superior court for Skamania county, McCredie, J., entered October 17, 1907, upon the verdict of a jury awarding damages in a condemnation proceeding. Affirmed.

George S. Shepherd, Helmus W. Thompson, and *Virgil A. Crum*, for appellant.

A. L. Miller and *Carey & Kerr*, for respondent.

RUDKIN, C. J.—This is an appeal by a property owner from the award of damages in a condemnation case. The order adjudicating the questions of public use and public necessity has heretofore been reviewed by this court at the instance of the present appellant. *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637. The order was there affirmed in an opinion filed September 13, 1907, and the opinion closed by vacating the order theretofore granted suspending further proceedings in the court below. On the 28th day of September following, a formal order was entered of record in this court vacating the supersedeas granted at the time of the allowance of the writ of review. The first error assigned is based on the order setting the case for trial before a jury, before the remittitur from this court was sent down or filed in the court below. There is no merit in this assignment. The power of this court to vacate the supersedeas is not questioned, and as soon as this was done, the court below was at liberty to proceed with the trial, without let or hindrance from this court.

It is next contended that the order setting the case for trial before a jury was made outside of the county in which the action was pending, and was, therefore, without the jurisdiction of the court and void. If we were to concede that the record shows that the order complained of was granted outside of the county and was for that reason void, it does not

appear that the appellant was prejudiced thereby. It was accorded a fair and impartial trial, with full opportunity to be heard, and notice of the time and place of trial is intended for no other purpose. The ruling was therefore not prejudicial.

The next two assignments relate to the trial of the action before a jury without proper notice or the payment of a jury fee; but these assignments were waived on the oral argument. *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632, and cases cited.

It is next contended that the court erred in denying a motion to require the respondent to produce and submit plans for the construction of its roadbed across the property in question. This claim of error, it seems to us, is based on a false assumption on the part of the appellant. It assumes that it will have a right to use the property taken jointly with the respondent, and that its damages will, therefore, depend on the character of the use made of the property by the respondent. But the respondent has acquired the right to the exclusive use of the strip of land taken for railroad purposes, and to wholly exclude the appellant therefrom, and it would therefore seem immaterial whether the roadbed was constructed on a trestle or on a fill or embankment. The damages to the appellant arise from the deprivation of the use of the property and not from the manner in which the property may be used by the respondent. Furthermore, it would seem that the appellant was fully advised as to the character of the use to be made of the property by the proceedings already had in the cause, and the numerous maps and plats filed therein, and we are satisfied that no harm resulted to the appellant from the ruling complained of.

Objection is next made to the competency of two witnesses called by the respondent on the question of damages. These witnesses were farmers who had lived in the vicinity of the land taken for nearly thirty years. They were fully competent to state the value of the land taken for agricultural

purposes, and this was practically the only use made of the property up to that time. The appellant contended that the land was chiefly valuable for booming purposes, and it insists that these witnesses were not competent to fix its value for such purposes. This may be conceded, but it might be said, on the other hand, that the witnesses who fixed the value of the land for booming purposes for the appellant did not know its value for agricultural purposes. The use for which the property taken was most valuable, as well as the measure of damages, was in issue before the jury, and testimony which would be competent in one aspect of the case might be utterly immaterial in another. If the jury should find that the land was chiefly valuable for booming purposes, they would, of course, disregard testimony tending to show its value for agricultural purposes, and if they found it chiefly valuable for agricultural purposes, they would disregard the testimony tending to show its value for booming purposes. The witnesses were, therefore, competent to give testimony on a material issue in the case, and the objection to their competency was properly overruled.

It is next contended that the court erred in refusing to require the respondent to produce and file a plan of its proposed bridge across Wind river. It is conceded that the bridge in question is not on the land in controversy, and there was no error in this ruling.

It is next contended that the damages allowed by the jury are inadequate, but on this question there was a wide and hopeless conflict in the testimony. There was testimony tending to show that the resulting damages would be any place from a few hundred dollars to as many hundred thousand dollars, and the verdict is well within the extremes given by the different witnesses. The jury and the trial judge heard the testimony and viewed the premises, and their conclusion is final on this court. *Portland & Seattle R. Co. v. Clarke County*, 48 Wash. 509, 93 Pac. 1083.

It is lastly contended that the court erred in its decree of

appropriation, by divesting the appellant of all right, title, and interest in or to the lands taken. The decree in this respect must be construed in connection with the statute, and as thus construed it is not erroneous. Finding no error in the record, the judgment is affirmed.

MOUNT, DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8556. Department One. June 27, 1910.]

EDWIN J. BROWN, *Appellant*, v. THE STATE OF WASHINGTON, *Respondent*.[1]

PHYSICIANS AND SURGEONS—LICENSE—STATUTES. Rem. & Bal. Code, § 8421, prohibiting the practice of dentistry without a license is not unconstitutional by reason of conflict with the constitution or by reason of its maladministration by state authority.

INJUNCTION—EQUITY—ENFORCEMENT OF CRIMINAL LAW. Equity has no jurisdiction to review the judgment of a criminal court or to restrain execution of a criminal sentence, where no property rights will be affected by the enforcement of a void statute.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered September 27, 1909, upon sustaining a demurrer to the complaint, dismissing an action to vacate and enjoin the enforcement of a judgment of conviction of practicing dentistry without a license. Affirmed.

John R. Parker, for appellant.

The Attorney General and *W. V. Tanner*, *W. F. Magill*, and *Geo. A. Lee*, *Assistants*, for respondent.

RUDKIN, C. J.—The plaintiff in this action was convicted before the superior court of King county of the crime of practicing dentistry without a license, in contravention of section 8421, Rem. & Bal. Code, and the judgment of conviction was affirmed by this court on appeal. *State v. Brown*,

[1]Reported in 109 Pac. 802.

37 Wash. 106, 79 Pac. 638, 117 Am. St. 798, 68 L. R. A. 889. The present action was instituted against the state, in the superior court of Thurston county, to review and reverse the last mentioned judgment, and to restrain the state from the enforcement thereof. A demurrer to the complaint was sustained in the court below, and from a judgment dismissing the action, this appeal is prosecuted. The question presented by the appeal is thus stated in the appellant's brief:

"The only question before the Honorable court raised by this record is the constitutionality of the act under which the appellant was prosecuted. Our contention is that it is unconstitutional for two reasons, first, by its terms and in substance it is in conflict with the constitution; second, it is unconstitutional by reason of its maladministration by state authority."

The question thus presented is a familiar one in this court, as a reference to the following cases will show: *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *In re Thompson*, 36 Wash. 377, 78 Pac. 899; *State v. Brown, supra; State v. Sexton*, 37 Wash. 110, 79 Pac. 634; *State v. Littooy*, 37 Wash. 693, 79 Pac. 1135; *State v. Littooy*, 52 Wash. 87, 100 Pac. 170.

But aside from the fact that the question suggested by the record is no longer an open one in this state, there is another all controlling reason why the judgment must be affirmed. A court of equity has no jurisdiction to review or vacate the judgment of a criminal court, or to restrain the execution of a criminal sentence. In this conclusion all the authorities, state and Federal, English and American, agree. High, Injunctions (4th ed.), § 157; 2 Story, Equity (13th ed.), § 893; Freeman, Judgments (4th ed.), § 484a; 22 Cyc. 903; *Ex parte Sawyer*, 124 U. S. 200; *Fitts v. McGhee*, 172 U. S. 516; *Harkrader v. Wadley*, 172 U. S. 148; *Suess v. Noble*, 31 Fed. 855; *Stuart v. Board of Supervisors*, 83 Ill. 341, 25 Am. Rep. 397.

An apparent exception to the general rule exists where

property rights will be destroyed or rendered valueless by the enforcement of a void statute or ordinance, but this case falls within the general rule, and not within the exception. The judgment is therefore affirmed.

FULLERTON, GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8852. Department Two. June 27, 1910.]

OLIVE S. KEITH, *Respondent*, v. PERRY S. ROSE *et al.*, *Appellants.*

OLIVE S. KEITH, *Respondent*, v. EDWIN FLOOD *et al.*, *Appellants.*[1]

JUDGMENTS—VACATION—LIMITATIONS — NOTICE — PURCHASERS AT SALE. Under Rem. & Bal. Code, § 303, authorizing a court to grant relief from a judgment within a reasonable time, and § 466, fixing the extreme limit beyond which judgments cannot be vacated at one year, purchasers at an execution sale under a judgment fair on its face are not represented by the judgment creditor or his attorney after the expiration of one year; and the vacation of a judgment thereafter on notice only to such attorney is void as to purchasers not made parties, regardless of whether the judgment was void.

Appeal from a judgment of the superior court for Kitsap county, Frater, J., entered January 20, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions of ejectment. Reversed.

O. L. Willett and *P. W. Willett*, for appellants.

William C. Keith and *Blaine, Tucker & Hyland*, for respondent.

RUDKIN, C. J.—Between the 24th day of October, 1901, and the 11th day of November, 1901, tax judgments were entered in the superior court of Kitsap county, foreclosing

[1]Reported in 109 Pac. 810.

the lien of delinquency certificates against the property now in controversy, in five certain actions therein pending, wherein the Northwestern Investment Company was plaintiff and the Washington Southern Railway Company and others were defendants. The property was sold pursuant to these judgments, and the Northwestern Investment Company became the purchaser at the sale, receiving its tax deeds under date of November 11, 1901, and December 6, 1901. On the 20th day of January, 1902, the investment company conveyed a portion of the premises to the defendant Perry S. Rose, and the remainder to the defendant Edwin Flood. The Rose deed was filed for record on the 21st day of January, 1902, and the Flood deed on the 5th day of January, 1904. On the 26th day of September, 1904, Edwin Flood conveyed to the defendant Adelaide Flood.

On the 4th day of February, 1903, the Washington Southern Railway Company filed motions to vacate the tax judgments in the several tax proceedings. These motions were served on the prosecuting attorney of Kitsap county, who appeared as attorney for the plaintiff in the foreclosure proceedings, but no notice was served on Rose or Flood, the grantees of the purchaser at the tax sales, and they made no appearance at the hearing. The motions to vacate were granted, and the several tax judgments set aside and held for naught. Thereafter and on the 16th day of March, 1903, the Washington Southern Railway Company conveyed the property embraced in the tax deeds to William C. Keith, and on the 14th day of September, 1905, William C. Keith conveyed to his wife Olive Keith. The present actions were instituted on the 3d day of January, 1906, by the plaintiff, Olive Keith, to recover the property from Rose and Flood, the grantees of the purchaser at the tax sale, and inasmuch as the two actions involved the same questions, they were consolidated and heard together. The court below made findings of fact and conclusions of law, and from the judg-

ment on these findings and conclusions in favor of the plaintiff, the present appeal is prosecuted.

The appellants challenge the validity of the respondent's title to the property in controversy on a great many grounds, but in view of the conclusion we have arrived at on one of the grounds thus presented, a consideration of the others becomes immaterial. The tax judgments and tax deeds under which the appellants claim are fair upon their face, each of the judgments containing the recital, "That summons and notice have been duly served in this proceeding as required by the statutes of this state, and such statutes complied with in all other respects pertaining thereto," and unless the appellants are bound by the subsequent orders vacating the tax judgments, the tax title must prevail.

In *Ryno v. Snider*, 49 Wash. 421, 95 Pac. 644, it was held that an order vacating a tax judgment, without notice to the purchaser at the tax sale, was void, and a similar ruling was made in *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164. The respondent contends that these cases are not controlling here, for the reason that in the cases cited the purchaser at the tax sale was not a party to the action. This difference no doubt exists and, within certain limits, the distinction is a material and important one. In *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. 896, we held that the grantee of a judgment creditor, who purchased the property of the judgment debtor at execution sale, did not occupy the position of an innocent purchaser in good faith, and acquired no greater right by a conveyance from the judgment creditor than the latter had. In other words, the grantee of a judgment creditor takes the property subject to the risks incident to the litigation, and is bound by the final outcome of the action. If the judgment is reversed on appeal or error, or is vacated on motion within the year allowed by law, the reversal or vacation defeats the title of the judgment creditor or his grantee. To this extent, and within these limits, we are of opinion that the judgment creditor and his attorney

represent the grantee of the judgment creditor, and, in the absence of fraud or collusion, the latter is bound by judgments or orders made in the cause, although not a party to the proceedings. But in the nature of things, a time must come when a purchaser of property is not represented by his grantor, and is not bound by judicial proceedings to which he is not a party and of which he has no notice, and that time arrives when the judgment becomes final under the law and is no longer subject to reversal on appeal or vacation on motion. Any other rule would be intolerable. No person would purchase property which had passed through an execution or judicial sale if his title might be divested years afterwards in a proceeding to which he was not a party and of which he had no notice.

Proceedings to vacate a judgment must be instituted under either section 303 or section 464, Rem. & Bal. Code. Under section 303 as originally enacted (Code of 1881, § 109), the application had to be made within a reasonable time, not exceeding five months after the expiration of the term. Terms of court were abolished by the constitution, and the limit with reference to the term was left out of the amendment of February 26, 1891, Laws of 1891, p. 106 (Rem. & Bal. Code, § 303), but the legislature did not thereby intend that such motions should be entertained at any time after judgment. Section 466, Rem. & Bal. Code, fixes the extreme limit beyond which judgments cannot be vacated on motion at one year, and such has been the limitation uniformly applied by this law. *Greene v. Williams*, 13 Wash. 674, 43 Pac. 938; *Denton v. Merchants' Nat. Bank*, 18 Wash. 387, 51 Pac. 473; *Boston Nat. Bank v. Hammond*, 21 Wash. 158, 57 Pac. 365; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959; *Scott v. Hanford*, 37 Wash. 5, 79 Pac. 481.

This limitation may not apply to judgments which are void on their face, but it does, in our opinion, fix a limit beyond which a purchaser of property is not bound by judicial proceedings to which he is not a party. Believing, there-

fore, that the orders vacating the tax judgments are null and void as against the appellants, the tax judgments and tax deeds constitute an absolute bar to the respondent's claim, and the judgment must be reversed with directions to dismiss the action. It is so ordered.

DUNBAR, CROW, PARKER, and MOUNT, JJ., concur.

[No. 8832. Department Two. June 27, 1910.]

GEORGE DRIVER, *Respondent*, v. BONHAM GALLAND *et al.*, *Appellants*.[1]

EVIDENCE—PAROL EVIDENCE—CONTRACTS. In an action for services performed, oral testimony as to negotiations prior to a written contract for services is proper, where part of the services were performed before the written contract was made.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error cannot be predicated upon the admission of cumulative evidence upon a point proven at length without objection.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY. There is sufficient evidence that defendant's agent and attorney in fact, who had general authority to build a house, had authority to change or abrogate the written contract entered into by him and to substitute an oral agreement respecting the compensation of the builder, where whatever was done was in the legitimate carrying out of the enterprise for which the agency was created, and the agent, testifying as a witness for the defendant, said that he was the agent and attorney in fact for the defendant in the transactions with the plaintiff.

SAME—PLEADING—DENIAL—SUFFICIENCY. Where a general denial in a paragraph in a complaint alleged that the defendant through an agent and attorney in fact orally employed plaintiff upon a certain consideration to build a house, a general denial thereof and particularly that any other contract was made than a certain written contract, does not put in issue the authority of the agent to represent the defendant in the transaction, where another paragraph of the complaint alleging that the person was the agent and attorney in fact of the defendant was not denied in the answer.

[1]Reported in 109 Pac. 593.

APPEAL—REVIEW—THEORY OF TRIAL BELOW. As the supreme court will determine a cause upon the theory on which it was tried below, a defendant in an action on contract made by an agent and attorney in fact cannot urge in the supreme court that there was no evidence of authority of the agent to make the contract, where the pleadings did not raise that question, no evidence thereon was offered or instructions requested and no exceptions taken to instructions defining the issue, and the whole issue tried below was as to whether the contract had been made.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 17, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Shank & Smith, for appellants.

Hastings & Stedman, for respondent.

DUNBAR, J.—This is an appeal from the judgment of the court founded on a verdict of the jury, in an action brought by the respondent against the appellants as executors, to recover an alleged commission of ten per cent of the cost of construction of a large business block in the city of Seattle, as compensation for supervising the construction of said building. The complaint alleged, that Caroline Kline Galland, through her attorney in fact, Bonham Galland, employed the respondent to furnish estimates for the construction of the building according to certain plans; that these estimates were furnished, and aggregated a certain amount, which was afterwards reduced to a certain other amount; that Caroline Kline Galland, personally and acting through her duly authorized agent, Bonham Galland, employed the respondent to construct said building for the agreed compensation of ten per cent of the cost of construction; that shortly thereafter and on August 19, 1905, a written contract was entered into, by the terms of which the respondent agreed to furnish all material, pay all labor, and construct said building for the sum of $85,450; that about one week thereafter, by mutual consent between the respondent and Caroline Kline

Galland and Bonham Galland, her agent, it was agreed that the written contract should be abrogated and set aside, and that the work should proceed upon a ten per cent basis; that the contract was in fact set aside and held for naught, and that the work did proceed upon a percentage basis; sets forth that certain extras amounting to $25,793.47 were ordered, and makes demand for a percentage on such extras. The appellants admitted that the respondent furnished the estimates as alleged, and admitted that they consented to $11,800 of extras, but denied that they ever agreed to any more than this, and denied that any other contract was ever made except as set forth in the written contract, or that the same was ever abrogated or set aside. Respondent recovered judgment in the sum of $11,510.57. After the verdict, appellants filed a motion for judgment *non obstante veredicto*, which was overruled, and motion for new trial being overruled, appeal followed.

The errors assigned are, that the court erred in admitting certain oral testimony of negotiations prior to the written contract, and erred in admitting the testimony in relation to the prior estimates, and in refusing to grant appellants' motion for judgment *non obstante veredicto*, for the reason that there was no evidence showing, or tending to show, the authority of Bonham Galland, as agent, to abrogate the written contract for the construction of the building or to substitute a different and oral agreement therefor. As to the first assignment, a portion of the work was done before the written contract was entered into, and of course the testimony objected to was competent. So far as the second error is concerned, while we do not deem it material, yet in any event the main portion of the testimony in relation to the fact that the estimates did not include profit for the respondent was proven at length by the testimony of the respondent without objection on the part of the appellants, and the subsequent testimony objected to was merely cumulative.

The main question in the case is the one raised by the third

assignment of error, viz., that there was no evidence to show, or tending to show, the authority of the agent to abrogate the written contract. A great many principles of law are announced by the appellants, and a great many cases cited to sustain them. The correctness of these principles of law contended for cannot be questioned, but as we view this case, they are not applicable. Stripped of all immaterial questions and contentions, the real question in this case is, Did the agent have authority to enter into these several contracts? If he did, did he have authority to change or rescind any or all of the contracts, or substitute one for another? That he had general authority to build the house is not denied as a question of fact. As a question of law, it follows that, without special limitations, whatever was done by the agent, in the legitimate carrying out of the enterprise which the agency was created to effect, was done under the authority of the agency. That there was authority we think is established by the testimony of the appellant Galland. Upon his introduction, he was asked by his attorney as follows:

"Q. Mr. Galland, you are one of the defendants in this case? A. I am. Q. And one of the executors of the estate of your deceased wife? A. Yes, sir. Q. Are you the Bonham Galland who acted as the agent and attorney in fact for Caroline Kline Galland? A. I am. Q. In the transactions with Mr. Driver, the plaintiff? A. Yes."

It is the earnest contention of the appellants that this testimony does not show, or tend to show, authority on the part of the agent Galland to abrogate the written contract and substitute therefor an oral contract in relation to the commission. But while the answers are somewhat general, it does show conclusively that he was acting as agent and attorney in fact for Caroline Kline Galland in all the transactions which were the subject-matter of the controversy, and the transactions concerning which he testified comprehended as much the abrogating of the written contract as they did the execution of the contract in the beginning, or the oral agreement made prior to the written agreement.

But there is another reason why the appellants cannot prevail in this case. It has been the uniform holding of this court that we will determine a case here upon the theory upon which it was tried below, and that alleged errors which are not called to the attention of the lower court could not be reviewed here. See, *Normile v. Thompson*, 37 Wash. 465, 79 Pac. 1095; *Nielsen v. Northeastern Siberian Co.*, 40 Wash. 194, 82 Pac. 292; *Sanders v. Stimson Mill Co.*, 34 Wash. 357, 75 Pac. 974; *Standard Furniture Co. v. Anderson*, 38 Wash. 582, 80 Pac. 813; *Yarwood v. Billings*, 31 Wash. 542, 72 Pac. 104. In order to determine exactly what was tried below and what it was the intention of the parties litigant to try, we must resort to the pleadings and the testimony offered, the instructions of the court, instructions objected to and instructions asked, and to the character of the trial generally. The complaint alleged, in paragraph 1, that, at the times in question, Bonham Galland was attorney in fact for said Caroline Kline Galland. This allegation is not denied. Paragraph 4 of the complaint alleges that said Caroline Kline Galland, personally and acting through her duly authorized agent in fact, Bonham Galland, employed the plaintiff to construct said building, upon the agreed compensation of ten per cent of the cost of construction. The answer to that paragraph is as follows:

"Answering paragraph 4 thereof, they deny each and every allegation therein contained, and particularly that any other contract was made and entered into excepting the contract marked A and attached to the complaint."

It was evidently not the intention to deny the agency of Bonham Galland, because that had not been denied; so that the matter which was intended to be denied, and which comes under the denomination "particularly denied," was that portion of the paragraph in relation to the employment of plaintiff to construct said building upon the agreed compensation of ten per cent of the cost of construction. When viewed in connection with the answer as a whole and with the subse-

quent trial of the case, the denial of paragraph 4 is not a denial of authorization on the part of the principal, Caroline Kline Galland, but is a denial of the alleged fact that respondent was employed to construct said building upon the agreed compensation of ten per cent of the cost of construction, and gives no notice of the denial of the authority of the agent. The appellants argue that, inasmuch as Bonham Galland denied that he ever abrogated this written contract or set it aside, to adopt the position of respondent would certainly be a legal paradox, because it would amount to a man denying having done an act and admitting at the same time that he had authority to do that act. But we are unable to see anything paradoxical in this attitude. A man might have authority to do a certain thing or to make a certain agreement, and still not do the thing or make the agreement. And this is really the case in a great majority of the contests over the question of whether or not a certain agreement was made. When it came to the trial of the cause, it was equally clear that no question was raised over the authority of Bonham Galland to abrogate this contract; but it was earnestly contended, and the whole battle was waged by the appellants on the theory, that he did not, as a matter of fact, abrogate the written contract. This, with the exception of a few collateral questions, such as the amount and value of the extras which were furnished, was the whole question controverted in a long suit involving over two hundred pages of testimony. This issue was presented clearly, and without any equivocation, as the controlling issue in the case. It must have been the understanding of the respondent that there was no question concerning the authority of the agent, for he made no effort to prove it. It was evidently so construed by the appellants, for there was no motion for judgment at the close of the plaintiff's testimony; and, as we have seen, if there was any lack of testimony in this respect it was furnished by the appellants in questions propounded to the witness Galland. The instructions of the court show conclu-

sively what his conceptions of the issue were. The court instructed the jury what the complaint alleged, as we have set forth above, and stated the defendants' alleged defense as follows:

"The defendants in their answer deny any agreement for the construction of said building on a percentage basis, but state that said contract of date August 19, 1905, was the only agreement entered into between plaintiff and defendants";

no intimation that there was any issue raised as to the authority of the agent, but that the issue was a clear-cut issue on the facts as to whether the agent had in fact abrogated the written contract. These instructions of the court in relation to the issues which were presented to the jury were not objected to by the appellants, nor was any instruction asked looking to the determination of the question of authority of the agent by the jury. The only exceptions which were made to the instructions were an exception in relation to the reimbursement for extras, and for the refusal of the court to propound special findings to the jury; the special finding asked for being: "Was the written contract dated August 19, 1905, abrogated or set aside?" no question of authority being embraced in the finding asked for. The appellants, if we understand the record correctly, also asked the court for the following instruction, which was practically incorporated in the instructions:

"If this plaintiff is entitled to recover, he must show by a clear preponderance of the evidence that this written contract was abrogated or set aside and an oral contract substituted therefor; and if you find from the evidence that the written contract was not abrogated or set aside, then plaintiff cannot recover and your verdict must be for the defendant."

Again, counsel for the defendants asked the following instruction:

"The court instructs you that there must in this instance have been a distinct intention, common both to the plaintiff

and to Bonham Galland. Doubt or difference is incompatible with the agreement. The minds of the parties must meet as to all the terms," etc.

recognizing Bonham Galland as the principal actor in the case, and not questioning his authority. And so with all the other instructions asked for by the defendants. On this theory the case went to the jury, and it would be inequitable to allow a litigant to try out his case to a jury upon a certain theory and, upon the jury finding against him, to come to this court and ask for a retrial of the case upon issues which were not presented to the court below. The question presented was evidently an afterthought, for while the third assignment states that the motion for judgment *non obstante veredicto* was based on the fact that there was no evidence tending to show the authority of Bonham Galland as agent to abrogate the written contract made for the construction of the building, and substituting a different and oral agreement therefor, the motion itself, as it appears in the record, does not bear out that construction. The grounds alleged in the motion were, (1) that the contract, if any, upon which the plaintiff sued and upon which a verdict was returned, was a contract void for uncertainty; (2) that the only contract in this case that was proven was the contract dated August 19, 1905 (which was the written contract), and that there is no evidence legally sufficient in the case upon which the jury could find that this contract had been abrogated; (3) that there is no evidence legally sufficient to entitle the plaintiff to a verdict, but that there is evidence legally sufficient to entitle the defendants to a verdict, and (4) that, under the law and the evidence, the defendants are entitled to recover in this action. The second reason suggested embraced the old question of fact, viz., that there is no evidence upon which the jury could find that the contract had been abrogated. We do not know what argument may have been made upon this motion to the court, but so far as the motion itself indicates,

the question which we are now asked to pass upon was not presented to the court at any stage of the proceedings.

The judgment is affirmed.

RUDKIN, C. J., PARKER, CROW, and MOUNT, JJ., concur.

[No. 8715. Department One. June 28, 1910.]

ARABELL BOTHELL, *Respondent*, v. NATIONAL CASUALTY COMPANY, *Appellant*.[1]

INSURANCE—ACCIDENT INSURANCE—POLICY—MORE HAZARDOUS OCCUPATIONS—LIABILITY. Where a policy of accident insurance provides that, upon change by the insured to a more hazardous occupation, the company's liability shall be only for such proportion of the indemnity as the premium paid would have purchased at the rate fixed by the company for the more perilous hazard, the policy automatically adjusts itself to the occupation of the insured; and where the agent, upon correct answers by the insured stating his occupation as that of a logger, incorrectly stated his occupation in the policy to be that of a logging contractor, recovery can only be had at the rate fixed for the actual and more hazardous occupation (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 30, 1909, upon findings in favor of the plaintiff, in an action on a policy of accident insurance, after a trial on the merits before the court without a jury. Reversed.

Fred G. Clarke, H. T. Granger, and *Henry C. Walters*, for appellant.

John L. Rockwell and *Robert C. Saunders*, for respondent.

GOSE, J.—On October 15, 1908, one A. J. Bothell made a written application to the appellant for a policy of accident insurance. Immediately preceding his signature to the appli-

[1]Reported in 109 Pac. 590.

cation, the following provisions are printed in the same type as the remainder of the application:

"I understand and agree that, if I contract illness or am injured fatally or otherwise after having changed my occupation to one classified by this company in their manual as more hazardous than that herein stated, or if I am injured while performing, temporarily or otherwise, any act pertaining to any more dangerous hazard or exposure, or occupation, the company's liability shall be only for such proportion of the principal sum or other indemnity as the premium paid by me will purchase, at the rate fixed by the company for such greater or more perilous hazard or exposure,"

and

"I further agree to accept the policy subject to its provisions, conditions, limitations and the company's manual of classification of hazards."

The application states that the applicant is the owner of a logging camp, and that his duties are "contracting only; not working." The appellant accepted the application, issued its policy of insurance with a copy of the application attached, and forwarded it to the insured. The application is by express words made a part of the policy. The policy was issued on October 17, 1908, and the insured sustained injuries from which he died, while working as a logger on November 17 following. The case was tried to the court, and a judgment entered in favor of the respondent for $1,000 and costs. The appellant contends that the judgment should have been entered for $100, with legal interest and costs, which it tendered in its answer.

The record presents but one question. The respondent pleaded, and was permitted to prove, that the insured fully and truthfully stated the duties of his occupation to the appellant's solicitor, who procured the application, and that the solicitor wrote a false answer to the printed question in the application, and thereby caused the application to falsely state that the duties of the insured were "contracting only; not working," when the insured had informed him that he

did "everything about the camp. Sometimes I tend hook; sometimes drive team, run engine," etc. The appellant objected to the introduction of this evidence. The appellant's manual of classification of hazards, which was admitted in evidence, provides that the death indemnity for a logger under the policy is $100. We think the respondent can recover only this sum with legal interest. The policy automatically adjusts itself to the occupation of the insured, and gives him such indemnity as the premium paid by him will purchase in the occupation in which he is engaged when injured. This is fair and equitable to both the insurer and the insured. True, it does not give the beneficiary all that the solicitor promised, but it does give her all that the premium would have purchased had the application truthfully stated the occupation. By the automatic provisions of the policy the insured is guaranteed protection, and the company is protected against the overzeal and dishonesty of its agents.

The case is not analogous to the cases in this and other jurisdictions hereafter referred to, where the insurance company sought to avoid all liability on account of breaches of warranty clauses, where the true facts were stated to the agent and false answers were written in the application by him. In such cases it has been held that his knowledge is the knowledge of the company, and that it will not be presumed that the company intends to issue a worthless policy. An analogous case may be stated by supposing that a man fifty years of age applied for a policy upon his life, correctly stating his age; that the agent falsely stated in the application that the applicant was twenty-one years of age, and the policy contained a provision adjusting the liability of the company to such sum as the premium paid would purchase according to the age of the applicant at the time of the issuance of the policy. Certainly, in such a case, the beneficiary could not recover more than the premium paid would purchase at the regular premium rate according to the mortality tables. *Ferguson v. Lumberman's Ins. Co.*,

45 Wash. 209, 88 Pac. 128, is in point. That was an action to recover upon a fire insurance policy. The application and the policy described only lumber while contained in the yard, or the sheds in the yards of the assured. The court permitted oral evidence on the part of the insured, to the effect that the agent of the company stated to the insured when the application was signed, that the policy was an "unlimited policy," meaning that it covered lumber in the mill and the adjoining buildings as well as lumber in yards, and that the insured would not have taken the policy but for such statements; and also that, at the time the policy was delivered and thereafter, the agent renewed the statement. It was held that the evidence tended directly to contradict the terms of the policy and the application, and that the court erred in admitting it. We think this case in principle clearly supports the view that the terms of the application and policy in the case at bar must control. In the *Ferguson* case it was sought to show that the agent represented that the policy included property not described in the application or the policy. In the case at bar the respondent contends that it can recover on the policy as modified by the parol testimony.

In *Employers' Liability Assur. Corp. v. Back*, 102 Fed. 229, circuit court of appeals, ninth circuit, an instructive case upon this point, the written application of the assured stated that:

"My occupation is that of an importer and dealer in Chinese merchandise and contractor for Chinese labor. The class of risk under my occupation is agreed to be ordinary. I understand that risks are differently classified, according to occupation; and I agree that for any injury received in any occupation or exposure classed by this company as more hazardous than those above stated I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard."

The policy, issued and accepted pursuant to the application, provided that the company insured the assured, "engaged in the business or occupation of a merchant under

classification ordinary," in the sum of $5,000. The policy, among other conditions, stipulated that:

"If the insured is injured in any occupation or exposure classed by this corporation as more hazardous than that herein given, his insurance and weekly indemnity shall be only for such amounts as the premium paid by him will purchase at the rate fixed in such increased hazard."

The insured sustained an injury from which he died. The answer alleged that, after the issuance of the policy and without the knowledge or consent of the company, the insured engaged in employment as a foreman of Chinese laborers and as a laborer, and that while engaged in such employment he met with the accident which caused his death; that such occupation was much more hazardous than that described in the policy, and that, according to the rules, customs, laws, and rates established by the company and by others engaged in the business of accident insurance, in force long prior to the issuance of the policy, the business of a laborer or a foreman of Chinese labor was and is classified as a special risk; that the premium paid by the insured, if he had insured with the defendant and had been described in the application and policy as a foreman of Chinese laborers, would have purchased insurance in the sum of $3,000, and no more, payable in the event of the death of the insured under the circumstances mentioned in the policy; and that, had the company known that he intended to engage in the occupation of a laborer or foreman of Chinese labor, it would have classified him in the policy as special, and would have refused to insure him in excess of $3,000. The answer contained an offer to pay $3,000, or to consent to judgment in that sum. By an amendment to the answer, it was alleged that the solicitor was the agent of the insured, and that the solicitor knew that the assured was engaged when he signed the application, and intended to continue, as an actual working foreman of Chinese laborers, and did not disclose that fact to the company. The trial court found that the solicitor was the agent of the

company, that the insured fully and truthfully stated to him the nature of his employment, and concluded, as a matter of law, that the beneficiary was entitled to recover $5,000. In reversing the case the court said that it was not material that the solicitor knew the actual occupation of the assured, and that it was not material whether he was the agent of the assured or the company, and that, under the application and the policy, the assured could only recover such sum as the premium paid by him would purchase at the rates fixed for such increased hazard.

The respondent insists that the judgment in this case must be affirmed upon the authority of *Foster v. Pioneer Mut. Ins. Ass'n*, 37 Wash. 288, 79 Pac. 798. In that case a policy of insurance against loss by fire had been issued, based upon a written application signed by the assured, stating, in answer to questions, that the chimneys and flues of the house were constructed of brick, that the applicant was the sole owner of the land upon which the building stood, and that none of the personal property was incumbered. The fact was that the flues were not made of brick, the land was held by the assured under a contract of purchase, and the personal property was purchased by him under a conditional sale contract. It was held that it was competent for the insured to show, that he stated the exact truth to the agent of the company before signing the application; that the agent wrote false answers, and that the assured did not and could not read either the answer or the application, but that he signed the application relying upon the assurance of the agent that he had truthfully recorded his answers. This case and *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, and *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185, in this jurisdiction, and *Despain v. Pacific Mut. Life Ins. Co.*, 81 Kan. 722, 106 Pac. 1027; *Michigan Mut. Life Ins. Co. v. Leon*, 138 Ind. 636, 37 N. E. 584, and *Otte v. Hartford Life Ins. Co.*, 88 Minn. 423, 93 N.

W. 608, 97 Am. St 532, in other jurisdictions, announce the rule that the agent who solicits the insurance is the agent of the insurance company, and that a policy will not be held void, nor will a warranty clause in a policy be held to have been breached, for a cause known to the agent before the application for the policy was signed, where the assured fully and truthfully related the facts to the solicitor and false answers were written in the application by the solicitor. But we do not regard these cases as announcing any principle which would permit the respondent to recover $1,000, the indemnity for the death of a contractor under this policy, or as announcing a principle which would defeat and destroy the automatic provisions of policies of this character.

Travelers' Ins. Co. v. Snowden, 60 Neb. 263, 83 N. W. 66, and *Carpenter v. American Accident Co.*, 46 S. C. 541, 24 S. E. 500, cited by the respondent, support her contention. This distinction, however, may be remarked: In the *Snowden* case, a general agent classified the assured with full knowledge of his occupation, and the application was not attached to and made a part of the policy in either case. The court ruled in both cases that the knowledge of the agent was the knowledge of the company, and that it was estopped to raise the question of an erroneous classification. To follow the rule announced in the last two cases would be to say that an insurance company is powerless to make a contract of insurance which is equitable and just to the insured, and which will at the same time protect the company against the dishonesty of its agents.

The judgment is reversed, with directions to enter judgment in conformity with this opinion.

RUDKIN, C. J., CHADWICK, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—In *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, and in other cases following that case, this court has announced the rule that, an insurance company that issues a policy of in-

surance on an application procured by one of its solicitors, cannot be heard to plead the fraud or dishonesty of the solicitor for the purpose of avoiding liability on the policy, and this, although the application for the policy, or the policy itself, may contain a recital to the effect that the solicitor shall be deemed the agent of the assured, and not the agent of the insurance company. The opinion of the majority, in my judgment, violates this principle, and I therefore dissent from the conclusion reached therein.

[No. 8661. Department One. June 29, 1910.]

ZACHARY T. EAST *et al.*, *Appellants*, v. R. G. HULBERT *et al.*, *Respondents*.[1]

APPEAL—BOND—NECESSITY. Where no bond on appeal was given the appeal will be dismissed.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered September 13, 1909. Dismissed.

Alvin W. Barry, for appellants.

W. E. Grant, *P. D. Smith*, and *E. K. Pendergast*, for respondents.

PER CURIAM.—Respondents move to dismiss the appeal upon the ground, among others, that no appeal bond has been given. An examination of the record as filed in this court discloses no bond. The motion is therefore well taken, and the appeal is dismissed.

[1]Reported in 109 Pac. 607.

[No. 8721. Department One. June 29, 1910.]

CHARLES I. D. LOOFF *et al.*, *Appellants*, v. SEATTLE PARK COMPANY, *Respondent*.[1]

LANDLORD AND TENANT—LEASE—COVENANTS—CONSTRUCTION. Where the lessor of two blocks subleased the undivided one-half interest in one block and the easterly half of the other block, and the sublease covenanted that the sublessee could conduct certain specified amusements on the east half of the block leased and that the lessor therein should not conduct any amusement on "said premises," the sublease does not operate to restrain the lessor from conducting amusements on the west half of the block not included in the sublease.

Appeal from a judgment of the superior court for King county, Main, J., entered October 2, 1909, upon findings in favor of defendant, after a trial on the merits before the court without a jury, in an action in equity. Affirmed.

Charles A. Riddle and *Thomas B. MacMahon*, for appellants.

Ira Bronson and *D. B. Trefethen*, for respondent.

RUDKIN, C. J.—On the 1st day of September, 1906, the West Seattle Land & Improvement Company leased blocks 455 and 456 of Seattle tide lands to Joseph L. Ward and W. W. Powers for a term of ten years. On the 2d day of January, 1907, Ward and wife assigned all their right, title and interest in the lease to Powers, and on the 21st day of January, 1907, Powers and wife assigned to the defendant, the Seattle Park Company. By an agreement, undated, but acknowledged by the parties on the 11th day of January, 1907, the defendant agreed to lease the easterly five lots of block 456, and an undivided one-half interest in block 455, to the plaintiff Looff, for a term expiring on the 31st day of August, 1916, subject to renewal, and on the 25th day

[1]Reported in 109 Pac. 806.

of June, 1908, a lease was executed pursuant to the last-mentioned agreement. The plaintiff Luna Park Amusement Company claimed some rights as assignee under the plaintiff Looff. The agreement for a lease between the defendant and the plaintiff Looff, and the lease itself, contained the following covenant or agreement which gave rise to the present controversy:

"It is expressly covenanted and agreed that the party of the second part [Looff] shall have the right to conduct such forms of amusement and entertainment on the said easterly five (5) lots of block 456 as he may desire, including the sale of candies, pop-corn, ice-cream and soft drinks and cigars, and all slot-machines, and nickle-in-the-slot machines, excepting as follows:

"That the party of the second part [Looff] shall not conduct any bathing establishment, any cafes, any restaurants or any skating rink on said premises; and the party of the first part [Seattle Park Company] shall not conduct any amusement except as specified on said premises."

The present action was instituted to recover the receipts of certain games and amusements conducted by the defendant on the three westerly lots of block 456, not included within the lease; to restrain the defendant from conducting or carrying on certain games and forms of amusement on said last described lots in the future, and for other relief not deemed material on this appeal.

The court below ruled that the defendant was not restricted in the use it might make of the three westerly lots of block 456, by the above mentioned covenant or agreement, and gave judgment accordingly. From this judgment, the plaintiffs have appealed.

It seems to us that the judgment of the court below should be affirmed. We look in vain to the contract between the parties for any limitation or restriction upon the right of the respondent to use its own property for any lawful purpose. The first part of the covenant or agreement upon which the appellants rely is limited by its terms to the east-

erly five lots of block 456. The words *the said premises*, in the exception or reservation, necessarily refer to the same lots, and when the same words are used a second time in the same sentence they naturally, if not necessarily, refer to the same lots. But if they do not, to what property do they refer? No other property is mentioned or described in the lease, except for the purpose of fixing the rental, and we find no justification for holding that the term *said premises*, as there used, refers to or includes the three westerly lots of block 456, rather than to any other property the lessor might own. The covenant is superfluous in some respects, and meaningless in others, but this will not justify us in giving it a meaning that its language does not convey. The right of the lessee to conduct such lawful forms of amusement and entertainment on the demised premises as he might desire would exist without an express grant, and the lessor would have no right to conduct games or amusements on the demised premises without any covenant against the right, but it is useless for us to speculate as to the probable intentions of the parties, for they have not taken the precaution to use language indicative of such intentions. Suffice it to say that the lease, as written, contains no restriction on the right of the respondent to use its own premises, in its own way, for any lawful purpose, and if the lease does not express the agreement of the parties in this respect, the remedy of the appellants is by action for reformation, and not an action based on a covenant which does not exist.

The judgment is accordingly affirmed, but the affirmance will be without prejudice to a new action to reform the lease, should the appellants elect to prosecute such an action.

CHADWICK, FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8658. Department One. June 30, 1910.]

GEORGE BUYKEN *et al.*, *Respondents*, v. LEWIS CONSTRUCTION COMPANY, *Appellant*.[1]

TRESPASS—JUSTIFICATION—EVIDENCE—QUESTION FOR JURY. In an action for trespass in sluicing and removing earth from plaintiff's lots, it cannot be said, as a matter of law, that plaintiff's removal from the premises to a house furnished by the defendant and permitting the work to go on, established that the work was done under a contract and that plaintiffs assented thereto, where the evidence on this issue was conflicting.

DAMAGES—INJURY TO PROPERTY—EXCESSIVE VERDICT. A verdict for $1,500 damages from the sluicing and removal of earth from a lot cannot be said to be excessive, where there was evidence that the lot was worth $4,000 or $5,000 before the injury, and was now of no value to live on, the nature of the wrongs was fully described to the jury, two juries awarded the same damages, and two trial judges had permitted the verdicts to stand.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 6, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for trespass. Affirmed.

Leander T. Turner and *Sandford C. Rose*, for appellant.

Bo Sweeney, for respondents.

RUDKIN, C. J.—As stated in the opinion on the former appeal of this case, *Buyken v. Lewis Construction Co.*, 51 Wash. 627, 99 Pac. 1007,[1]

"This was an action in trespass to recover damages for sluicing down and removing earth from a certain lot in the city of Seattle owned by the plaintiffs. The defendant admitted the acts complained of, though not in manner and form as alleged, and pleaded by way of justification that the sluicing was done pursuant to a verbal contract between the plaintiffs and the defendant, which was afterwards reduced to writing and signed by the defendant, though not by the

[1]Reported in 109 Pac. 608.

plaintiffs. The reply denied the plea of justification as set forth in the answer."

On the former appeal, the judgment was reversed and a new trial awarded for error in one of the instructions. The new trial resulted in a verdict in favor of the plaintiffs in the sum of $1,500, and from a judgment on the verdict, this appeal is prosecuted.

In support of the present appeal it is contended, first, that the evidence was insufficient to justify the verdict, and second, that excessive damages were allowed under the influence of passion and prejudice.

(1) The appellant maintains that the earth was sluiced and removed from the respondents' lot, under a contract between the appellant and the respondents, and that the respondents assented to the acts of which they now complain, at the time of their commission, but upon these questions there is a direct conflict in the testimony. It will readily be conceded that the conduct of the respondents in moving from their home on the lot in question to a house furnished by the appellant, and in permitting the work to go on, without remonstrance or protest, is inconsistent with their present claims, but there is no fixed standard by which the conduct of men can be measured, and under all the circumstances the issue between the parties was for the determination of the jury. It cannot be said, as a matter of law, that the conduct of the respondents was so far inconsistent with their present claims as to utterly destroy their direct and positive testimony.

(2) The testimony in support of the claim for damages was not as clear and specific as it might be, yet we think it was ample to sustain the verdict. There was competent testimony tending to show that the respondents' lot and improvements were of the value of $4,000 or $5,000, before the commission of the wrongs complained of, and while the testimony as to their value after the removal of the earth is somewhat indefinite, the nature of the wrongs were fully described to

the jury, and the testimony on the part of the respondents tended to show that the lot in its present condition is of no value to live upon. Under such circumstances, and in view of the fact that two juries awarded the same damages, after viewing the premises, and two trial judges who heard the testimony permitted the verdicts to stand, the claim that excessive damages were allowed under the influence of passion and prejudice cannot be sustained.

The judgment is therefore affirmed.

FULLERTON, CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8853. Department One. June 30, 1910.]

FRANK E. CASE *et al.*, *Appellants*, v. SAN JUAN COUNTY AND E. H. NASH, *Treasurer*, *Respondents*.[1]

TAXATION—ASSESSMENTS—EXCESSIVE VALUATION. A valuation of $50,000 for the purposes of assessment for taxation, upon 276 acres of land, chiefly valuable for limestone deposits, is excessive and constructively fraudulent, and should be reduced to $15,000 where the assessor stated that he was unable to fix the value of mineral land unless it was tested or developed, the value did not exceed $3 to $5 per acre aside from the limestone, and the land had not been developed and a few years ago had sold for $10,000; and an offer of $50,000 made and refused is not a sufficient basis upon which to fix the valuation, where the offer was coupled with a condition that six or seven thousand dollars be expended in development work and the land be demonstrated to contain sufficient limestone to operate a cement plant of 1,000 barrels capacity per day for twenty-one years.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered November 6, 1909, upon findings in favor of the defendants, in an action to abate an assessment and cancel a tax on real property, after a trial on the merits before the court without a jury. Reversed.

[1]Reported in 109 Pac. 809.

James Kiefer, for appellants.

R. E. Morris, for respondents.

RUDKIN, C. J.—The plaintiffs John H. McGraw and George B. Kittinger, copartners under the firm name of McGraw & Kittinger, are the owners of 275 92-100 acres of wild unimproved land in San Juan county, the title to which stands in the individual names of the several plaintiffs, in trust for the copartnership. During the year 1908 the assessor of San Juan county assessed all property in his county at forty per cent of its actual cash value, for the purpose of taxation, and fixed the actual cash value of the property in question at approximately $50,000, or the assessed value at $19,675. The plaintiffs, claiming that this assessment was unreasonable, oppressive, illegal and fraudulent, tendered to the county treasurer the sum of $83.94, in full of all taxes against their property for the year 1908, and upon the refusal of that officer to accept the tender, the present action was instituted to reduce or abate the assessment and to cancel the tax, upon the payment of the amount tendered, and for general relief. The court below adopted and approved the valuation fixed by the county assessor, and dismissed the action. From the judgment of dismissal, this appeal is prosecuted.

The character of the property is such that it is impossible for an assessing officer or a court to fix its actual cash value with any degree of certainty, but we are nevertheless convinced that the valuation fixed by the county assessor and approved by the court below is unreasonable and oppressive, and finds little or no support in the testimony. It is conceded that the lands are wild and unimproved, and are chiefly valuable for the limestone they are supposed to contain. The value of the land, aside from the limestone, does not exceed from $3 to $5 per acre, and the court so found. The testimony tending to show the value of the limestone deposits is extremely meager and unsatisfactory. Only two witnesses

testified on that point, the appellant George B. Kittinger for the appellants, and the county assessor for the respondents. The latter conceded that he has had no experience in the lime business, or in investigating the value of limestone property, except as county assessor, and that he is not an expert. He further conceded that it is impossible to fix the value of mineral land, unless it is tested or developed, that otherwise, "You have simply to make a guess at it."

It is likewise conceded that in fixing the value of this property the assessor was controlled in a large measure by the fact that the appellants had received an offer of $50,000 for the property. If such an offer had been made and refused, the act of the assessor in fixing the value in that sum would be fully justified, but the offer was coupled with important conditions which were perhaps unknown to the assessor. But whether known or unknown, the conditions attached to the offer left the offer itself of no probative force on the question of actual cash value. The offer was this. Certain parties agreed to pay the sum of $50,000 for the property, on condition that the owners would expend $6,000 or $7,000 in development work, and would prove or demonstrate that there was sufficient limestone on the land to operate a cement plant of the capacity of one thousand barrels per day, for a period of twenty-one years. Of course such an offer is of no moment in fixing the present cash value of property, unless coupled with a showing that these conditions were possible of fulfillment, and no such showing was made or attempted here. Such an offer might safely be made for land containing no mineral whatever. The price of $75,000, at which the owners hold the property, is based on similar conditions. If the worth of the property is demonstrated by a test, it will then have a fixed value; but the test may demonstrate its absolute worthlessness, and in that event the owners would lose not only the money expended in the development work, but they would, at the same time, destroy any speculative value the property may have at the present time. It ap-

pears from the testimony that the present owners paid in the neighborhood of $10,000 for the property in its present condition some few years ago, and there is nothing in the record to indicate that its value has materially increased since that time. This is the most, if not the only satisfactory evidence of value found in the record, and we find nothing to sustain a present cash valuation in excess of the sum of $15,000, as an outside limit. On a forty per cent basis this would fix the assessed valuation at $6,000, and we are satisfied that no assessment in excess of the latter sum should be permitted to stand. Such a discrepancy between the actual and the assessed value shows a constructive fraud. *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563; *Benn v. Chehalis County*, 11 Wash. 134, 39 Pac. 365; *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480; *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617; *Dickson v. Kittitas County*, 42 Wash. 429, 84 Pac. 855.

The judgment of the court below is therefore reversed, with directions to enter judgment cancelling the assessment upon the payment of a tax based upon an assessed valuation of $6,000. Inasmuch as one of the appellants died since the argument of the case before this court, judgment will be entered here as of the date of submission.

PARKER, GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8613. Department One. June 30, 1910.]

FRANK ROBERTS, *Appellant*, v. TACOMA RAILWAY & POWER COMPANY, *Respondent*.[1]

PLEADINGS—AMENDMENT AT TRIAL—CONDITIONS—DISCRETION OF COURT. In an action for injuries sustained through an electric shock alleged to have been caused by an electric current from an overhead trolley wire not properly insulated, it is not an abuse of discretion to require a continuance as a condition for allowing the complaint to be amended at the trial to allege that the current came from "other overhead wires," the defendant having asked for time to meet the new issue.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 13, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries. Affirmed.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for appellant.

B. S. Grosscup and *W. C. Morrow*, for respondent.

FULLERTON, J.—The appellant sued for personal injuries. The trial resulted in a verdict and judgment against him, and he appeals therefrom.

The allegations of the complaint setting forth the negligence charged were as follows:

"(2) That the said defendant's railway at 25th and Pacific is an ordinary overhead wire system, the trolley being attached on either side of the street by span wires which, when not properly insulated, become charged with the electric current from the trolley wire, which in turn charges the other wires connecting the said span wire and becomes dangerous to the people on the street and avenue.

"(3) That on the 19th day of November, 1908, and for a long time prior thereto, the said defendant was using a large light pole belonging to the City of Tacoma, at the northwest

[1]Reported in 109 Pac. 605.

corner of 24th and Pacific Avenue, and upon which pole the city maintained an electric police call box for the purpose and use of the policeman on the beat in that locality. The said defendant herein had attached to the said pole, at about twenty feet from the ground, several span wires holding up the defendant's trolley wire, and said defendant allowed and permitted, through its carelessness and negligence, one of said span wires to become broken, and the said defendant carelessly and negligently wrapped the lower end of the said span wire around the pole next to the police call box, leaving the same exposed and dangerous to the plaintiff, as hereinafter set forth; that the said defendant carelessly and negligently allowed and permitted the insulation of its wires to be such as to allow and permit the said broken wire to become heavily charged with electricity from its said trolley wire, all to the danger, as hereinafter more fully set out.

"(4) That on the 19th day of November, 1908, the plaintiff herein was in the employ of the city as a police patrolman upon the beat which includes the locality of 24th and Pacific Avenues, and under its employment, was required to report through the said police call box on the said pole at certain intervals; that at 8 o'clock p. m. on the said day he went to the said police call box to make his report, as was his duty, and, not knowing the dangerous condition of the said wire, the plaintiff undertook to step from the curb, after using the said police call box, onto the pavement, and placed his hand, as he thought, against the pole, and the plaintiff, without any fault on his part, touched the wire and came in contact with the wire of said defendant, as carelessly and negligently permitted to be and remain in such an exposed condition and position, whereby the plaintiff received a severe and great shock from the electricity which was there in said wire and which passed from the said wire into the body of the plaintiff through his right arm, shocking the plaintiff, throwing him to the pavement, maiming and injuring plaintiff for life."

These allegations were put in issue by the respondent, and the cause was set for trial to be had before a jury. On the day of the trial, after the jury had been impaneled and sworn, the appellant asked leave to amend his complaint by inserting therein an allegation to the effect that the broken span wire after it was wrapped around the pole became charged with

electricity from the appellant's trolley wire, "and other overhead wires."

The respondent thereupon made the contention that the amendment if allowed would introduce a new issue into the case which it was not then prepared to meet, and opposed the amendment unless a continuance should be granted it for a sufficient time in which to prepare to meet the new issue. Thereupon the court ruled that a new issue would be presented by the amendment, and announced that he would allow the amendment only on condition that the respondent be granted a continuance of sufficient time in which to prepare itself to meet the new issue, and allowed the appellant to elect whether he would proceed on the issues as framed or amend and allow the case to be continued. The appellant excepted to the court's ruling and elected to go to trial on the issues as framed. During the course of the trial it was shown that the electricity which charged the broken span wire probably came from some other source than the appellant's trolley wire, and the appellant again asked leave to amend his complaint to make it correspond with the case he conceived the evidence made in his favor. Leave was again denied him, and he again excepted. The motion was for the third time renewed and rejected at the conclusion of all of the evidence. The case was then submitted to the jury under an instruction to the effect that the jury could not find in favor of the appellant unless they found that the current of electricity causing his injury came from the respondent's trolley wire.

The appellant contends that the several rulings of the court constituted error requiring reversal, but we are unable to concur in this conclusion. The statute, it is true, allows the trial court, in the furtherance of justice, and on such terms as may be just, to permit an amendment to the pleadings at any stage of the proceedings, and justice requires that the rule be liberally complied with. But its application after all finally rests in the sound discretion of the trial judge, to be reviewed only for manifest abuse. We cannot

say here that there was any abuse of discretion. The appellant was not denied his right to amend; it was allowed him upon terms which he refused to accept, and he cannot now be heard to complain unless the terms imposed were so unjust as to amount to an abuse of discretion on the part of the trial court. In our judgment the terms imposed were well within the court's discretion. Manifestly, a new issue would have been injected into the case by the amendment. The respondent was entitled to time in which to meet this new issue, and it would be too much to hold that a continuance of the cause to some subsequent jury session of the court would be an abuse of discretion.

The court did not err in its instructions to the jury. As given they covered the issues made by the pleadings, and could be erroneous only on the theory that the amendment asked for should have been allowed.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8546. Department Two. June 30, 1910.]

A. A. BOOTH *et al.*, *Respondents*, v. WILLIAM E. CLARK *et al.*, *Appellants*.[1]

DEDICATION—PLATS—BOUNDARIES—EXCESS. Where fifty-foot lots and the streets as marked on the plat occupy the entire space between the north and south boundaries of the tract, any excess would be apportioned among the lots; and an excess or strip of four and one-half feet along a boundary line could not be claimed by the plattors or those claiming under them.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 15, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action of ejectment. Affirmed.

[1]Reported in 109 Pac. 805.

William C. Keith, for appellants.
Robert F. Booth, for respondents.

PARKER, J.—By this action the plaintiffs seek to recover from the defendants a strip of land about four and one-half feet wide, lying along the north line of section 6, block 6, of Haller's addition to Seattle. The cause was tried by the court with a jury, resulting in a verdict and judgment in favor of the plaintiffs. Defendants' motion for a new trial being denied, they have appealed.

The principal error claimed by learned counsel for appellants is the refusal of the court to direct a verdict in their favor. Squire Park addition lies to the north of and adjoining Haller's addition. Respondents own lot 6 in Haller's addition, which lot appears on the official plat of the addition to have the same northern boundary as the addition. Appellants claim that the strip in controversy lies between lot 6 and the boundary of the addition, and that it is not included in any lot; while respondents claim there is no such strip, but that the north line of lot 6 is the same as the north line of the addition.

Appellants acquired a quitclaim for this alleged strip from the heirs of the original owner of Haller's addition. In that deed the strip is described as lying along and adjoining lot 6 on the northerly side thereof. Appellants' title rests entirely upon this quitclaim deed, which was received by them after the owner of the addition had conveyed lot 6. All of the lots in Haller's addition are shown upon the official plat thereof as being fifty feet wide from north to south. This, with the widths of the streets of the addition marked upon each street upon the plat, shows the entire width of the addition from north to south, which corresponds with the width of the land described upon the margin of the official plat, by metes and bounds as being platted, within a fraction of an inch. Appellants' contention that this strip lies to the north of lot 6 rests upon certain evidence which

tended to show that the streets of the addition running east and west had been actually laid out and improved upon the ground by the city, about four and one-half feet south of their location as claimed by appellants, who rely upon the official plat. The survey by which this strip is found to exist appears to rest entirely upon the present location of the improved portions of the streets in the addition. There is evidence tending to show that these streets were improved in this manner in order to make them conform to the streets in additions upon the east and west of Haller's addition. We are unable to understand how the jury could have found differently than they did.

Block 6 consists of lots 4, 5, and 6, and upon the official plat these lots occupy the entire space between the north line of the addition and the street next south therefrom. These lots each are marked upon the plat as being fifty feet wide, and there is nothing upon the face of the official plat indicating that any deficiency or excess should be taken from or added to any particular lot. So even if there is an excess of four and one-half feet in the length of this block, no part of such excess would fall outside of any particular lot. Therefore any such excess should be apportioned among them. In 5 Cyc. 973, it was stated in the text:

"Where a tract of land is subdivided and is subsequently found to contain either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts."

This rule is supported by abundant authority. We are clearly of the opinion that the verdict and judgment correctly determined the rights of the parties.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8668. Department Two. June 30, 1910.]

VICTOR NELSON, *Respondent*, v. SMYTH CONSTRUCTION COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE OF FOREMAN—EXCAVATIONS—FALL OF ROCK—QUESTIONS FOR JURY. The negligence of a foreman in changing a stream of water in hydraulicing a bank of earth is for the jury, where it appears from the testimony of the plaintiff, a laborer engaged about the sluice boxes, that he was directed by the foreman to start a rock down the box, and while so engaged the stream was changed and directed against the bank above him without any warning, dislodging a rock which rolled upon him, although he started to run away as soon as the stream was changed.

Appeal from an order of the superior court for King county, Gay, J., entered November 27, 1909, granting a new trial, after granting a nonsuit at the close of plaintiff's case, in an action for personal injuries. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

Martin J. Lund, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, alleged to have resulted to the plaintiff from negligent acts of the defendant. The cause proceeded to trial before the court and a jury. At the close of the plaintiff's evidence, defendant's attorneys moved for a nonsuit on the ground, among others, that "There is no evidence to establish the alleged negligence on the part of the defendant," which motion was granted. Thereafter the plaintiff moved for a new trial, which was granted. The defendant has appealed.

The principal negligence charged against the defendant by plaintiff in his complaint is the following:

"That on said day plaintiff was working under the orders and directions of one of defendant's foremen, whose name he does not know, and whose orders plaintiff was directed to

[1]Reported in 109 Pac. 804.

obey by the defendant, and on said day the plaintiff was engaged under the directions of said foreman in breaking rocks washed from a bank of gravel, sand and hardpan, and the foreman was directing a stream of water upon said bank washing it down, and while the plaintiff was so engaged the foreman suddenly, unknown to the plaintiff, negligently and carelessly directed the stream of water to a part of the bank directly above where the plaintiff was working, thereby causing that part of the bank to come down and a large rock to fall upon the plaintiff, causing the injuries hereinafter complained of."

The sufficiency of the evidence to carry the case to the jury upon the question of negligence involved in this allegation we think is all that we are required to notice in determining the correctness of the learned trial court's ruling in granting a new trial. The evidence shows that the appellant was engaged in excavating a cut for a railway by hydraulicing; that is, by projecting a powerful stream of water into and against the sides and end of the cut, washing the material down and carrying it off through a sluice box. The sluice box laid in the bottom of the cut and extended up into it. The cut was about 50 feet deep, about 60 to 70 feet wide at the top, about 30 or 40 feet wide at the bottom, and about 70 feet long, the sides and end being very steep, the bottom sloping toward the sluice box. Respondent had gone to work for appellant some few days before he was injured, and had been engaged in working along the sluice box. Just before he was injured, the foreman asked him to take a rock apart which had been broken by dynamite, and make the pieces go down the flume. This rock lay about 8 feet from the upper end of the sluice box. It was while working there during the afternoon of January 12, 1908, that respondent was injured. He could not talk English very well, and some of his testimony was given through an interpreter. He testified, among other things, in describing the accident, as follows:

"Q. You went up and went to work breaking the rock? A. Yes. Q. And while you were doing that what happened

to you if anything? A. Then I started to work with the rock; I just heard the rock drop down, and then I turned up and I saw the water coming just behind me. He was making it go a little bit high, and I started to run as fast as I could, but I could not run more than I guess it was five or six feet. I am not sure of the exact feet, but I just started to run, and then it came so fast it catch me and I fell down the flume and the big rock on top of me. . . . Q. How far was the nozzle of the hydraulic? A. I guess ten feet on one side of it. Q. About ten feet from the flume? A. Yes. Q. This hydraulic was throwing a stream against the face of the cut? A. Yes. Q. How long a stream? A. It was about twenty-five feet. Q. How big a hydraulic was it? A. I guess it was three or four inches big. Q. There was one (boulder) apt to come down any time while you were working there? A. Well, not then. The water was coming on the other side. Q. Who had hold of the hydraulic. Was there any one directing the stream? A. The boss had hold. Q. The stream had been running at that same place about half an hour before you came up to work? A. Yes, sir. On the other side I was working. Q. How long had it been throwing the stream at this particular place? A. I can't exactly say, but about a couple of minutes. . . . A. When I commenced to work the water was plying away from me, but then I heard the stone and looked up and the water was going right over me. Q. How far had it been changed? A. It is hard to tell, but I believe it was about twenty-five feet. Q. You knew the water was apt to bring those rocks down at any time didn't you? A. Yes I knew that, but I didn't know the water was to be turned on the side where I was working. Q. Take out your watch and hold it up and wait until the minute hand goes around the circle one minute. (Witness does so.) Q. That is a minute isn't it? A. Yes. Q. Was it as long as that after the water was changed before the rock came down? A. I don't believe it was as long as a minute. Q. What caused the rock and sand and gravel to come down in that cut? A. Water. Q. What if any knowledge did you have when you went in to break the rock that the water would be turned over to the side where you were working? A. I knew that the water was being changed, but I didn't know it would change there."

This testimony, it seems to us, was such that respondent

was entitled to have the question of appellant's negligence submitted to the jury. If the foreman directed the stream over where respondent was at work resulting in bringing down the rock by which he was injured, the jury might well conclude that the injury was the result of appellant's negligence through its foreman. *Nelson v. Willey Steamship & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592.

Considerable of the argument of learned counsel for appellant is devoted to the subjects of contributory negligence and assumption of risk. We find nothing in this record to warrant us in holding that the injury was in any way contributed to by the negligence of respondent, and of course he did not assume any risks resulting from the master's negligence. 1 Labatt, Master and Servant, § 2.

We are of the opinion that the order of the learned trial court in granting respondent's motion for a new trial should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8617. Department Two. June 30, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. LOREN BEATTY, *Informed Against as Percy Warren, Appellant.*[1]

INDICTMENT AND INFORMATION—LESSER OFFENSES—ROBBERY—ASSAULT AND BATTERY. Under an information charging an assault with intent to rob, the defendant may not be found guilty of an assault and battery; no battery being charged and the same not being necessarily included in the offense of robbery; since Rem. & Bal. Code, § 2167, only authorizes a conviction for a lesser degree of an offense charged, and § 2168 only authorizes a conviction of a lesser offense necessarily included within the offense charged.

CRIMINAL LAW—APPEAL—DECISION—INSTRUCTIONS—HARMLESS ERROR. Under an instruction authorizing a conviction of assault and battery, under an information charging an assault with intent to

[1]Reported in 109 Pac. 1011.

rob, a verdict of guilty of assault and battery will be sustained as a conviction of assault; since the instruction was not prejudicial except as authorizing a conviction for a battery.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered July 22, 1909, upon a trial and conviction of assault and battery. Reversed.

E. C. Dailey, for appellant.

Ralph C. Bell and *Robert Mulvihill*, for respondent.

DUNBAR, J.—This is an appeal from a verdict and judgment for assault and battery growing out of the following information:

"That in the county of Snohomish, state of Washington, then and there being on or about the 28th day of May, 1909, the said Percy Warren, in and upon the person of one John Hanson, unlawfully and feloniously did make an assault with intent then and there unlawfully and feloniously and by violence and putting in fear, from the person of said John Hanson, the moneys, goods and chattels of the said John Hanson, to take, steal and carry away, contrary to the form of the statute in such cases made and provided," etc.

After the trial the court instructed the jury, among other things:

"You are hereby instructed that the defendant, should the evidence under these instructions justify it, may be convicted of any one of the following crimes, viz: (1) Assault with intent to commit robbery; (2) assault and battery; (3) simple assault. You are further instructed that the crime of assault and battery is defined as the unlawful beating of one person by another, and if you shall be convinced beyond a reasonable doubt that the defendant wrongfully beat or did unlawfully beat the complaining witness John Hanson, but did not at that time intend to rob the said John Hanson, you may find the defendant guilty of assault and battery."

The jury returned a verdict finding the defendant guilty of assault and battery. Judgment was entered and appeal followed.

Several assignments of error are made, but the only one which we think is entitled to consideration is the alleged error of the court in giving the instructions just above recited. A conviction for a lower degree can be sustained on an information charging a higher degree only upon the theory that the lower degree of the crime is necessarily embraced in the higher one; or, in other words, that the higher crime could not be committed without the commission also of the lower degree; and if robbery could not be committed without an assault and battery, there would be no error in the instruction given. But it is conceded that robbery can be committed without the commission of a battery, and hence a battery is not necessarily involved in the commission of the crime of robbery. The statute defines assault and battery as the unlawful beating of another, and defines assault as an attempt in a rude, insolent, and angry manner, unlawfully to touch, strike, beat, or wound another, coupled with the present ability to carry such attempt into execution. This information charges the defendant with making an assault, but makes no charge whatever of an assault and battery. The court in its instructions to the jury proceeded to define what an assault and battery was under the law. There being no charge of assault and battery, and assault and battery not being necessary to the commission of the crime of robbery, the court might as well have given the jury the definition of any other crime not material to the issues in the case.

Section 2167, Rem. & Bal. Code, provides that, upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. But under the information charging robbery, as we have seen, the crime of assault and battery was not necessarily an inferior or a crime connected in any degree with the crime charged. Section 2168 provides: "In all

other cases, the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information." As we have seen, the crime of assault and battery was not necessarily included within the crime with which he was charged, and the instruction was therefore erroneous. But, inasmuch as the jury must necessarily have found the defendant guilty of the crime of assault before they could have found him guilty of the crime of assault and battery, which they did, it seems plain that the instruction of the court could not possibly have prejudiced the jury, except in so far as they found him guilty of assault and battery instead of simple assault.

The judgment will be reversed, and the cause remanded with instructions to the court to pass sentence upon the defendant as upon a verdict for assault.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8714. Department One. June 30, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. ADOLPH DACKE, *Appellant*.[1]

RAPE—STATUTES—"PREVIOUS CHASTE CHARACTER"—DEFENSES. Under Rem. & Bal. Code, § 2436, making it rape to carnally know a female child between the ages of fifteen and eighteen years and of "previous chaste character," there can be no conviction for an offense committed on a certain date where for months prior thereto the parties had continued sexual relations, without any intervening reformation; and it is immaterial that the prosecutrix was chaste except as to the defendant, "previous chaste character" meaning sexual purity.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 5, 1909, upon a trial and conviction of the crime of rape. Reversed.

[1]Reported in 109 Pac. 1050.

Pruyn, Streff & Hoeffler, for appellant.

E. K. Brown and *O. O. Felkner*, for respondent.

Morris, J.—Appellant was convicted of the crime of rape, and appeals from the judgment entered. A number of errors are assigned, but we will refer to only one, which, in our opinion, is decisive of the appeal. The criminal code of 1909 amended the law relating to rape, among other changes making it a crime to carnally know a female child between the ages of fifteen and eighteen years and of previous chaste character. Rem. & Bal. Code, § 2436. Appellant was informed against under this new section, the charge being laid in Kittitas county, and the time as June 30, 1909. The state's evidence discloses that prosecutrix, who was then seventeen years old, and the appellant first became acquainted in Snohomish county, some time in October, 1908; that in the following November they began having sexual relations, with the full consent of prosecutrix, and that these relations were indulged in whenever opportunity afforded, until the following March, when prosecutrix with her family moved to Kittitas county. In May appellant went to Kittitas county and renewed his acquaintance with prosecutrix, and they again assumed their sexual relations until July 8, when appellant was arrested and charged with an offense occurring on June 30. At the close of the state's case, the prosecutrix having testified to these facts, concerning her relations with appellant, his counsel moved for a directed verdict of acquittal, which being denied, he excepted, and now alleges error in the court so ruling.

In construing the statute involved in this information, every requirement must be given effect as constituting an essential element in the offense created. The requirement that the female against whom the offense is committed shall be of "previously chaste character" was unknown to the common law, nor was it an ingredient of any statute of this state defining rape, until the act of 1909. When, therefore, that

act went into effect on the 8th day of June, 1909, it brought within its protecting terms a theretofore—so far as this crime is concerned—unknown requirement, that of previous chastity. The carnal knowledge of a female child between the ages of fifteen and eighteen years with her consent, under the old law, constituted rape; but under this act of 1909, under which this information lies, such carnal knowledge is not a crime unless the female child be of "previously chaste character." The act includes within its terms one female child and one male, and since the male person cannot commit the offense described in the statute except upon the female child described in the statute, it follows that, as to the male person charged with the crime, the female child must be "of previously chaste character"; not alone as to some other man, nor only as to all other men, but to the particular man named in the information. The female child named in this information having testified to voluntary sexual relations with appellant many times prior to June 30, she was not on that day within the protection of the statute, in that she was not "of previously chaste character." The term "of previously chaste character" means the same in law as in morals. It describes a condition of sexual purity. It means a female who has never submitted herself to the sexual embrace of man, and who still retains her virginal chastity. It is defined as "chaste in fact when seduced," in *Hussey v. State*, 86 Ala. 34, 5 South. 484; as "Actual personal virtue," in *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *Lyons v. State*, 52 Ind. 426; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177,

"A chaste female is one that has never had sexual intercourse—who yet retains her virginity. A virtuous female is one who has not had sexual intercourse unlawfully—out of wedlock, knowingly and voluntarily." *Marshall v. Territory*, 2 Okl. Cr. 136, 101 Pac. 139.

Whatever may be the language which one may choose to define a female of previously chaste character, it certainly cannot be contended that one who, moved by lewd desire and

libidinous impulse, submits herself to the carnal embrace of a man from November to July whenever the time and the place are opportune, is a female of such a character on the 30th day of June.

It is argued by the state that, as to the appellant, the prosecutrix is exempt from this requirement of the law; that being the author of her undoing, he cannot take advantage of his own wrong and hide himself under the cloak of this statutory requirement, as a shield for his protection. Such an argument is purely a sentimental one, and although it may be abhorrent to the moral sense to permit a man to protect himself with the shield of his own wrong, we are dealing with a legal question, and not one of sentiment nor morals; and in order to find a man guilty of such an offense as the one named in this information, we must first find a female who can in all its essentials measure up to the requirement of the law charged to be violated. The test of virtue in a woman is a personal and physical test, and when by reason of her voluntary sin she has lost her virginal purity, it matters not who contributed to that loss; she is no longer chaste. It is not a sound argument to say that the prosecutrix in this case was immune from rape as to all other men, but not from appellant. The statute makes no such distinction; neither can we. As is said in *Shirwin v. People*, 69 Ill. 55: "The right of the accused to defend must be as broad as that of the prosecution to criminate." Such we believe to be the reasoning of the law. Its authority will be found in similar cases to which we will now refer.

In *People v. Clark*, 33 Mich. 112, the defendant was charged with seduction on July 28. The complaining witness testified that the first offense was committed on that day. She then gave evidence of similar offenses committed in the month of August, one of which latter offenses was elected by the prosecution to go to the jury. The court held a conviction upon the latter act could not be sustained, and said: "The object of this statute was not to punish illicit cohabita-

tion. Its object was to punish the seducer." The court then holds there could be no seduction in August, even though made under a promise of marriage, when the evidence showed prior acts. The complaining witness having already fallen in July, there was in August no virtue to seduce. So, in *People v. Squires*, 49 Mich. 487, 13 N. W. 828, defendant was charged with seduction in September. The proof showed the first act of intercourse between the parties long prior to that. Held, complaining witness was unchaste in September, and could not then be seduced. In *Bailey v. State*, 57 Neb. 706, 78 N. W. 284, 73 Am. St. 540, the defendant was convicted of rape under a statute very similar to ours. The act charged was on June 13. The evidence disclosed that the first act of intercourse between defendant and prosecutrix took place in Iowa, the previous March. The court held that the conviction could not be sustained, as the prosecuting witness was not previously chaste in June, and said:

"The fact that she was first deprived of her virginity by the prisoner does not strengthen the state's case. . . . To sustain a conviction under it the evidence must show beyond a reasonable doubt, among other things, that the female with whom the sexual intercourse was had was, prior to that intercourse, sexually pure,—chaste as Diana."

The court then takes up the argument here made, that defendant could not take advantage of his own wrong, and holds that the state in criminal prosecutions cannot invoke the doctrine of estoppel against a defendant; that it is not enough to show a violation of the spirit of the statute, but that its very letter must be offended against. In *State v. Patterson*, *supra*, at page 96, the court says:

"Evidence of prior specific acts of unchastity with the defendant himself is now universally received, as well in cases of seduction as in cases of rape. What for? To show that in the latter class of cases there was less likelihood of absence of consent; and that in the former, in consequence of a prior act of the defendant, there was no chastity left to seduce. Can it be material by whom the prior act is performed, whether by the defendant, or whether by any one else?"

In *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592, the defendant was charged with seduction upon a "female of previous chaste character." Many acts of intercourse between the parties were testified to, occurring prior to the offense charged in the indictment. Held, that the conviction could not be sustained, upon the ground that, having indulged in frequent sexual intercourse with the defendant, the complaining witness was on the day charged not an unmarried female of previously chaste character. In *Carpenter v. People*, 8 Barb. 603, the act charged was abduction, under a statute describing the female as one "of previous chaste character." The time fixed was June, 1849. Evidence was given of an act of intercourse in 1846. The court held the female was not of previously chaste character, and said:

"The word 'previous' in this connection, must be understood to mean immediately previous, or to refer to a period terminating immediately previous, to the commencement of the guilty conduct of the defendant."

So, in the case before us, the use of those words in the information meant the time just preceding the commission of the crime charged, June 30. By her own evidence the prosecutrix was not then a female child of previously chaste character. Neither was she on June 8, when the law went into effect. She was not then within the description of the statute, and therefore not within its protection; and the motion of the defendant for a directed verdict should have been granted.

We do not wish to be understood as holding that a single act, or a number of acts of sexual intercourse, will forever deprive a woman of the protection of a statute requiring previous chastity. It has been often held that a woman may reform in law as well as in morals, and for the second time become the victim of the seducer's lust. But we have no such case here. There was no evidence of any reformation prior to June 30, nor of any assault then upon virtue's barrier

It was from first to last mutual desire and mutual gratification.

The judgment is reversed, and the cause remanded with instructions to discharge the defendant.

Rudkin, C. J., Parker, and Gose, JJ., concur.

[No. 8794. Department One. June 30, 1910.]

JOHN NORMAN, *Respondent*, v. SHIPOWNERS STEVEDORE COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—WARNING—EVIDENCE—SUFFICIENCY. There was sufficient evidence of negligence to warrant a recovery by a stevedore for injuries sustained in loading a vessel with heavy timbers, where there was evidence that it was the duty of the hatch tender to notify him of the approach of a timber, that the men worked in reliance upon the warning, and none was given to the plaintiff, the hatch tender having deserted his post, and the injury resulted by reason of failure to give the warning.

WITNESSES—IMPEACHMENT—OPINIONS—ADMISSIBILITY. It is not competent to rebut the statements of a witness giving his opinion as to the cause of an accident, admitted without objection, by other statements made by him, giving a different opinion; since the conclusions of the witnesses were incompetent, and not within the rule of impeaching a witness by contradictory statements made out of court.

Appeal from a judgment of the superior court for Snohomish county, Carey, J., entered November 27, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a stevedore engaged in loading a steamer with lumber. Affirmed.

A. R. Coleman and *John P. Hartman*, for appellant.

Hathaway & Alston, for respondent.

Morris, J.—Action to recover damages for personal injuries, verdict and judgment for respondent, and defendant appeals.

The errors assigned suggest the insufficiency of the evi-

[1]Reported in 109 Pac. 1012.

dence by way of motion for nonsuit, challenge and motion for judgment, the court's ruling on a question of evidence, and that the verdict is excessive. The respondent was a stevedore, engaged in loading a steamer with lumber. At the time of the accident, the hold of the steamer had been filled, and large timbers 12x12x50 were being loaded on deck. The timber was taken from the wharf by falls and winches, and was loaded alternately on each side of the vessel. In order to have these big sticks ride easily, the men had built what they call a "crack" or "gap" in the deckload, which was about four feet deep, into which the sticks were lowered by the winch, and then properly stored away by the men working in the "gap." In order to further assist in properly loading the sticks, they placed what they called "dunnage," being small cross-pieces of wood one or two inches thick upon which the big timbers were lowered. Respondent was at work in one of these gaps, with his back to the winch, stooping over and placing these dunnage strips, preparatory to receiving the next timber on his side, when he was hit by one of the timbers then being lowered into the gap, and received the injuries complained of.

Two grounds of negligence were alleged, the negligence of Carlson, the winch tender, and the failure of Schwartz, the hatch tender, to give warning by reason of his temporary absence from the scene of his duty, without the knowledge of respondent. The first ground was abandoned at the trial, and the entire evidence of negligence was confined to the second ground. Without setting forth the evidence in detail, it is sufficient to say there was ample testimony to show that it was the duty of the hatch tender to warn the men to look out when the timbers were lowered into place in the gaps, and that the men working in the gaps relied upon this warning and paid no attention to the timbers until notified by the hatch tender that one was about to be lowered into the gap. When the timber that caused respondent's injury came up, the hatch tender for some reason had gone to one of the other

winches, and respondent received no warning of its approach until he was struck and injured. The respondent testified that the hatch tender had been there when the last timber came into his gap, and that he supposed he was still there and would warn him of its approach. Other testimony shows the hatch tender had been gone from five to ten minutes. It appearing, then, that it was the duty of the hatch tender to warn, that the men relied upon this warning, that no warning was given, that respondent did not know the hatch tender had gone to the other winch, but depended upon him to give notice when the next timber would be lowered into the gap, there can be no question but that there was sufficient evidence to take the case to the jury on this charge of negligence, and to sustain the verdict and judgment. Appellant's theory of the cause of the accident is immaterial, since the jury by their verdict disregarded it. There was no error in the denial of either nonsuit or judgment. *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376.

The verdict is large but, in view of respondent's evidence as to the extent of the injury and his ability to labor since, we cannot say it is excessive. There being no medical testimony in the record as to the extent of the injury or its effect upon respondent's earning power, we must accept the only evidence we have, under which the verdict is not excessive.

Appellant called Carlson, the winch tender, as one of its witnesses, and examined him as to the manner of the accident. On cross-examination he was asked: "If the hatch tender had been at his place of duty as he ought to have been, could this accident have happened?" Manifestly such a question called for the conclusion of the witness and was improper, but no objection being made by appellant the witness answered: "That I couldn't say, but he would probably stop me from coming up until he seen everything clear." The witness was then turned over to appellant on redirect, and was examined for some time as to certain statements theretofore

made to counsel for appellant and Anderson, a witness for appellant. Among others, this question was asked him: "Do you remember stating to us, positively and repeatedly during that conversation, that the fact that Mr. Schwartz was at No. 4 winch before and at the time of the accident had absolutely nothing to do with the happening of the accident," to which he made answer: "No, sir. I never said such a question in my life. Of course, I don't understand it." Then the following question: "I am asking you if you did not state there that it would not have made any difference." Answer: "I don't think I did, sir, because I wouldn't state such a foolish statement." Appellant then called Anderson and asked this question: "Do you remember during the conversation that I have referred to, Mr. Carlson stating to us, in substance and effect, that the absence of Schwartz from the vicinity of No. 3 hatch, and the fact that he was running No. 4 winch, had nothing whatever to do with the happening of the accident?" Respondent objected and the objection was sustained, and such ruling is now asserted as error. This last question, like the one on cross-examination, called for the conclusion of the witness, and was properly ruled out. It did not come under the rule of showing contradictory statements made out of court, as neither question called for any specific detail or statement of a fact provable in the case. It was nothing more than the then expressed opinion of Carlson as to what effect, if any, the absence of the hatch tender had upon the accident. That, under the issues and evidence, was a question for the jury and not for the witnesses, whatever their opinion may have been, or however they may have expressed it, and it mattered not whether the witness entertained the same opinion at the trial as at some previous time, since neither was properly admissible in evidence, and hence no error can be predicated upon such ruling.

The judgment is affirmed.

Rudkin, C. J., Gose, Fullerton, and Chadwick, JJ., concur.

[No. 8627. Department One. July 1, 1910.]

H. G. Corbett *et al.*, *Respondents*, v. W. F. Weaver, *as Executor etc.*, *Appellant*.[1]

Evidence—Declarations by Decedent—Admissions—Self-Serving Declarations. In an action against executors for services rendered the deceased, evidence of a conversation had with deceased against interest is admissible, but a statement made by him in his favor is inadmissible as a self-serving declaration.

Appeal from a judgment of the superior court for Whitman county, Sullivan, J., entered May 26, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for services rendered. Affirmed.

J. P. Burson and *John Pattison*, for appellant.

Hanna & Hanna, for respondents.

Morris, J.—Respondents brought the action to recover for services rendered appellant's testator in his lifetime. They obtained judgment below, and defendant appeals.

The main assignments of error grow out of the admission and rejection of testimony. A witness in behalf of respondent was permitted to testify, over appellant's objection, to a conversation had with deceased, in which certain statements were made concerning his liability in the matter in issue. Such evidence was proper. The evidence admitted was in the nature of a declaration against interest, and would have been competent had the action been against deceased in his lifetime. Death does not render incompetent admissions and declarations of a party made against interest, in an action against his personal representatives. Elliott, Evidence, § 2087; *Miller v. McDowell*, 69 Kan. 453, 77 Pac. 101; *Griseza v. Terwilliger*, 144 Cal. 456, 77 Pac. 1034; *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92; *Schell v. Weaver*, 128 Ill. App. 106; *Hueni v. Freehill*, 125 Ill. App. 345.

[1]Reported in 109 Pac. 803.

Appellant sought to show a statement made by deceased in favor of his contention of nonliability. This was rejected. This was not error. It is well settled that, in an action of this character, declarations made by deceased in his favor are in the nature of self-serving declarations, and are inadmissible. *Avery v. Moore*, 34 Ill. App. 115; *Scribner v. Adams*, 73 Me. 541; *Ward v. Ward*, 37 Mich. 253; *Jilsun v. Stebbins*, 41 Wis. 235; *Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709; *Reese v. Murnan*, 5 Wash. 373, 31 Pac. 1027.

Appellant argues that the same rule should apply in both cases; either all the statements and declarations of deceased should be admitted or none. The same distinction applies after death as before. Death does not create any new, nor disturb any old, rules of evidence, except in so far as the statute renders evidence of transactions with deceased inadmissible, when the adverse party sues or defends in a representative capacity. Such statute, however, has no controlling application to either the evidence admitted here or that rejected, since the rules here announced would be the same irrespective of the statute, the rule of admissibility being determined, not by the statute but by the character of the declarations, admitting that against interest, rejecting that in interest. *Miller's Appeal*, 100 Pa. St. 568, 45 Am. Rep. 394; *Hayden v. Pierce*, 71 Hun 59, 25 N. Y. Supp. 55.

The remaining assignments relate to the refusal to enter judgment notwithstanding verdict, and the denial of a new trial. Upon the motion for a new trial the errors here presented were before the court, and, for the reasons here given, its ruling was correct. There is no merit in the motion for judgment, as the evidence was sufficient to sustain the verdict, if believed by the jury, and the verdict itself is the best proof that it was.

The judgment is affirmed.

Rudkin, C. J., Fullerton, and Gose, JJ., concur.

Chadwick, J., took no part.

[No. 8626. Department One. July 1, 1910.]

VINCE H. FABEN, *Appellant*, v. B. L. MUIR, *Respondent*.[1]

APPEAL—REVIEW—GRANT OF NEW TRIAL. An order granting a new trial upon conflicting evidence will not be disturbed on appeal.

NEW TRIAL—DECISION—INCONSISTENCY. It is not inconsistent to grant a new trial upon the ground of insufficiency of the evidence and to refuse to sustain the contention that the verdict was excessive, where the issue was as to the making of a contract and the excessiveness of the verdict depended on such issue.

Appeal from an order of the superior court for King county, Gay, J., entered December 11, 1909, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Kerr & McCord, for appellant.

Will H. Thompson, for respondent.

PER CURIAM.—The appellant sued the respondent, claiming a balance due upon an account for services as an attorney. Issue was taken upon the allegations of the complaint and the cause tried before a jury, who returned a verdict in the appellant's favor. The respondent thereupon moved for a new trial, setting up the various statutory grounds therefor, which motion the court granted on the specific ground that the evidence was insufficient to support the verdict. From the order granting a new trial, this appeal is taken.

In the early case of *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907, this court announced the rule that it would not disturb the order of a trial court granting a new trial on the ground that the evidence was insufficient to justify the verdict, where there was a substantial conflict in the evidence, and Mr. Hayne was quoted as saying that this rule had been announced more frequently than any other rule of practice.

[1]Reported in 109 Pac. 798.

The rule has been adhered to by us ever since, and is now the established rule of practice governing appeals in such cases. *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109; *Welever v. Advance Shingle Co.*, 34 Wash. 331, 75 Pac. 863; *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Gregg v. Northern Pac. R. Co.*, 49 Wash. 183, 94 Pac. 911; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246.

That there was a conflict in the evidence on the question of the appellant's right to recover, a most cursory examination of the record will show. Indeed, the trial occupied the time of the court for the better part of three days, and on all of the principal questions in dispute the parties were diametrically opposed to each other. In addition to this, there was much evidence of a collateral nature tending to support the several contentions of the parties. The evidence was sufficient to support a verdict for either party, and this is what is meant by a substantial dispute.

Among the grounds upon which the motion for a new trial was based was the ground that the verdict was excessive. The court refused to sustain this contention, and it was argued at bar that this ruling was inconsistent with the ruling granting a new trial, since if the verdict was not excessive it could make no difference whether or not it was sustained by the evidence. An examination of the evidence discloses, however, that the question of the excessiveness of the verdict was dependent on the view taken of the question whether there was a contract between the parties fixing the amount the appellant was to receive for his services. If there was such a contract, as the respondent contended, then the verdict was excessive; in fact the verdict should have been in his favor rather than against him. On the other hand, if there was no contract, and the appellant should be permitted to recover on a *quantum meruit*, the verdict could be said to be within the evidence introduced to show the value of the services. But as we have before intimated, the real contest was over the question whether there was such a contract, and the

record makes it clear that it was on this question that the court doubted the sufficiency of the evidence to support the finding. It would seem, therefore, that the court might overrule the motion on the first ground and sustain it as to the second, without laying itself open to a charge of inconsistency.

The judgment is affirmed.

[No. 8600. Department One. July 1, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES PHILLIPS, *Appellant*.[1]

HOMICIDE—INFORMATION—ALLEGING DEATH. An information charging that the defendant killed the deceased on a certain day, sufficiently alleges that the deceased died on that day.

APPEAL—RECORD—INSTRUCTIONS. Under Rem. & Bal. Code, §395, written instructions and requests for instructions are part of the record without being embodied in the statement of facts or bill of exceptions.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. Upon a conviction of murder in the second degree, error in instructions in defining deliberation and premeditation are immaterial.

HOMICIDE—INSTRUCTIONS—SELF-DEFENSE. Instructions upon the subject of self-defense to the effect that the defendant had the right to act upon appearances and that the necessity must be real or apparent, are not objectionable because closed with the statement that "the jury and not defendant must be judges of these matters."

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT. The duty to retreat before taking life in self-defense has no application to one against whom a felonious assault is made with a deadly weapon.

SAME—INSTRUCTIONS. In a prosecution for murder where the deceased had threatened the defendant and each had armed himself with a rifle and they met and both instantly fired almost simultaneously, it is prejudicial error to give an instruction upon the common law rule relating to the duty to retreat or warn an adversary, if he had time to do so, as it had no application to the facts of the case.

[1]Reported in 109 Pac. 1047.

CRIMINAL LAW—TRIAL—MISCONDUCT OF COURT. In a prosecution for homicide, it is misconduct on the part of the trial judge, requiring a new trial, to make an imputation against the good faith of counsel in taking objections or exceptions to the ruling of the court upon the admission of evidence.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered September 20, 1909, upon a trial and conviction of murder in the second degree. Reversed.

E. Fitzgerald and *Frank H. Foster* (*Geo. W. Sampson* and *Alex M. Winston*, of counsel), for appellant.

William C. Brown, for respondent.

RUDKIN, C. J.—The defendant was convicted of the crime of murder in the second degree, and prosecutes this appeal from the final judgment and sentence of the court. A demurrer interposed to the information was overruled, and upon this ruling, the first error is assigned. The information, following a form often approved by this court, charged, "That he, the said Charles Phillips, in the county of Okanogan, in the state of Washington, on or about the 25th day of July, 1908, purposely and of his deliberate and premeditated malice killed one Rawl Siebert, etc." The specific objection urged against the information is its failure to charge that Rawl Siebert died within a year and a day from the infliction of the mortal wound. There is no merit in this contention. As said by this court in *State v. Day*, 4 Wash. 104, 29 Pac. 984, "The allegation that the defendant killed the deceased is certainly in effect an averment that the latter died." See, also, *State v. Cronin*, 20 Wash. 512, 56 Pac. 26; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988; *People v. Sanford*, 43 Cal. 29; *State v. Sly*, 11 Idaho 110, 80 Pac. 1125.

Errors are assigned on the instructions of the court, and on the refusal of the court to instruct as requested, and in this connection the appellant is met by a motion to strike the instructions and the requests for instructions from the record,

because not embodied in a statement of facts or a bill of exceptions. This latter contention cannot prevail. The charge of the court was made wholly in writing, the requests for instructions were also in writing, and section 395, Rem. & Bal. Code, expressly provides that such instructions and requests for instructions, when filed in the cause, become a part of the record, "and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts."

A number of assignments of error are based on the court's definition of the terms deliberation, and premeditation, but these assignments we need not consider, as they apply only to the crime of murder in the first degree, of which the appellant stands acquitted by the verdict of the jury. Two of the instructions excepted to, defining the right of self-defense, were given in the following language:

"*Further as to self-defense*: In order to justify the taking of human life on the grounds of self-defense, there must be a necessity, real or apparent, to prevent death or great bodily harm. The prisoner has a right to act on the circumstances as they appeared and are proven, provided you are convinced that the circumstances, as proven, showed an appearance of an imminent, threatening, present and immediate danger to life or great bodily harm,—the jury and not defendant must be judges of these matters."

"*Self-Defense:* If you find that defendant was where he had a perfect right to be and that Siebert so threatened him or so acted towards him as to induce in him a reasonable and honest ground of apprehension that he was in imminent danger of life or limb, Phillips had a legal right at once to use necessary force and means to prevent the threatened injury, even to the extent of taking Siebert's life, but although Phillips may have been where he had a right to be, and Siebert was threatening him with a rifle, still Phillips would have no right to take the life of Siebert without first warning him to desist from his attack, unless you find from the evidence that Phillips was justified in believing that he had no time to give such warning."

The appellant earnestly insists that the first quoted in-

struction is erroneous because of the closing words: "The jury and not the defendant must be the judges of these matters." While this part of the charge may not be happily worded, we do not think that it is subject to the criticism, or open to the objection urged against it. The court charged the jury that the appellant had a right to act *upon appearances*, and that the necessity for taking the life of his adversary must be real *or apparent*. Of course it was for the jury to say, under all the circumstances, whether the danger was real or apparent, and whether the appellant acted from honest convictions induced by a reasonable belief, or otherwise. We do not think that the language complained of imports anything more than this.

While the second instruction complained of may be a correct statement of the law in the abstract, it had no application to the facts before the court in this case. It was no doubt the established rule of the common law that a person assaulted must retreat to the wall or warn his adversary to desist before taking his life in self-defense, provided always there was time and opportunity for making such retreat or giving such warning, in safety. But it was likewise an established rule of the common law that,

"A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence and surprise to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense." *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 846, and authorities cited.

In other words, the duty to retreat or warn has no application to one against whom a felonious assault is committed with a deadly weapon. It is idle to say that a person assaulted by a highwayman in the street, or by a burglar in his home, must retreat or give warning before he can law-

fully resort to the right of self-defense. Without attempting to pass upon conflicting testimony or the credibility of witnesses, the rule as thus stated holds good in this case. Briefly stated, the situation was this. The appellant and the deceased had some difficulty at Republic some three weeks prior to the homicide in question. As a result of this difficulty there was testimony tending to show that each had made threats against the life of the other. In anticipation of a meeting with the appellant, the deceased had armed himself with a rifle. Whether he thus armed himself for the purpose of making an assault, or for the purpose of self-defense, was for the jury to say. On or about the 25th day of July, 1908, the parties met in a public highway. The appellant was on horseback with his rifle thrown across his arm. The deceased was in a wagon with his rifle within easy reach. As the parties met, the deceased seized his rifle, sprang from the wagon, and each sought to take the life of the other with a deadly weapon, at short range. Within a few seconds, and almost simultaneously, two shots were fired, one by the appellant and the other by the deceased. A preponderance of the testimony tends to show that the deceased fired first. The appellant was unharmed and the deceased was killed. The only dispute in the testimony was, who was the aggressor? The party first assaulted, whether the appellant or the deceased, was clearly acting in self-defense. There was neither time nor room for retreat or warning, and an instruction upon that question could only tend to mislead or confuse the jury.

It is said that this instruction was copied almost literally from an instruction approved by this court in *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810. This is true, but an instruction which is correct in the abstract, or correct as applied to one state of facts, may be very misleading when applied to another and different state of facts. When the court instructed the jury that a person against whom a murderous, felonious assault is committed with a deadly weap-

on must retreat or give warning, before taking the life of his assailant in self-defense, it imposed upon him a burden which the law does not sanction, and the fact that the instruction was qualified by the proviso, if he has time to retreat or give such warning, does not necessarily render the instruction harmless. In other words, instructions covering every possible phase of the law of self-defense should not be given in any case unless called for by the testimony, as abstract rules of law not applicable to the facts of a given case are sometimes as misleading as incorrect rules. So much of the law of self-defense as is applicable to the facts before the court should be given in plain and concise language, but rules of law applicable to other and different facts should be withheld from the jury.

We deem it unnecessary to say more concerning this instruction, for the judgment must be reversed on another ground which we will now consider; namely, misconduct of the trial court. During the progress of the trial the appellant was offering proof of a conversation had between the appellant and the witness on the stand, regarding the deceased. To this offer the state objected, whereupon the following colloquy took place between the court and the attorney for the appellant:

"Mr. Fitzgerald. I expect to connect this your honor. Judge. You can make a lot of declarations. Mr. Fitzgerald. I except to what the court says. Judge. Every time the court speaks take an exception. Mr. Fitzgerald. I will. Judge. Every time the court bats his eye take an exception."

As said by Chief Justice Cooley in *Wheeler v. Wallace*, 53 Mich. 355, 364, 19 N. W. 33, 37:

"If the only question that could arise upon this colloquy were one of the proper courtesy to be observed between court and counsel, we should be inclined to leave it to the judge's own sense of propriety, taking it for granted that there must have been in the case some undisclosed circumstance that disturbed the judicial calmness, and caused the utterance

of unguarded expressions for which, as the counsel in the case was a thoroughly reputable gentleman, we may well suppose the judge took early occasion to apologize."

But we are of the opinion that something more than a mere question of courtesy or propriety is involved here. Whether the words of the court were spoken in anger, as claimed by the one side, or in a joking way, as claimed by the other, we may not inquire, but which ever view we accept, the conduct of the judge was not in keeping with either the time or the place. The appellant was on trial for his life, and as said by this court in *State v. Coella*, 3 Wash. 99, 28 Pac. 28:

"The solemnity of a trial upon the issue of which hangs the life of a human being, wherein it is to be determined whether such life shall be taken as a just penalty to satisfy the demands of justice outraged, if so found, can scarcely be approached in any other proceeding over which human beings have control. Certainly any man connected therewith, filling an important position, in arriving at a decision therein, and fulfilling the duties of his position, would realize the awful responsibility resting upon him, and act with becoming dignity."

See, also, *Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. 371; *Walker v. Coleman*, 55 Kan. 381, 40 Pac. 640, 49 Am. St. 254; *Hubbard v. State*, 37 Fla. 156, 20 South. 235; *House v. State*, 42 Tex. Cr. 125, 57 S. W. 825; *Poole v. State*, 45 Tex. Cr. 348, 76 S. W. 565.

Counsel for appellant had offered testimony which was perhaps incompetent and irrelevant in itself, under a promise to connect it up and show its competency at a later stage of the trial,—a common practice on the trial of lawsuits, and the response of the court, "You can make a lot of declarations," cannot be construed otherwise than as an imputation against the good faith of counsel making the offer. In other words, it was a clear imputation that counsel was attempting to get improper testimony before the jury under a promise he did not hope or expect to fulfill. And when counsel ex-

cepted to the remarks of the court, as was his right and his duty under the law, he was met by a challenge to take an exception every time the court spoke, and every time the court batted his eye. The aid of counsel is guaranteed by the constitution to every person accused of crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error. The appellant may be guilty, and his previous reputation may weigh heavily against him, but this affords all the greater reason why no word or act of the court should add to or increase the heavy burden his counsel is already supporting.

Other errors are assigned, but they call for no special consideration, as the questions will not arise, in the same form at least, on another trial. For the reasons stated, the judgment of the court below is reversed, and the cause remanded for a new trial.

GOSE and DUNBAR, JJ., concur.

[No. 8644. Department One. July 1, 1910.]

ORA BELL DOLAN *et al.*, *Respondents*, v. D. J. CAIN, *Appellant*.[1]

LOGS AND LOGGING—LIEN—PERSONAL JUDGMENT—JURY TRIAL—WAIVER. In an action to foreclose a lien upon logs, asserted in good faith but not established, the court has jurisdiction to enter a personal judgment against a defendant liable upon contract for the services performed by the plaintiff; and the judgment is not erroneous, in the absence of demand for a trial by jury, under Rem. & Bal. Code, § 316, relating to waiver of a jury.

COSTS—WITNESS FEES. Costs are properly allowed for a witness who attended at the request of the prevailing party without subpoena, although not called to testify because the course of the trial rendered the testimony unimportant.

[1]Reported in 109 Pac. 1009.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered October 18, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a logger's lien. Affirmed.

Waters & Downer, for appellant.

Neterer, Pemberton & Sather, for respondents.

Gose, J.—The respondents brought this action to recover a balance due for boarding the employees of the appellant, and to foreclose a lien upon logs and other personal property. The court denied the lien, but entered a personal judgment against the appellant, from which he has appealed.

The complaint alleges that, between certain dates, the respondent Ora Bell Dolan, at the request of the appellant, furnished the supplies and the board for his employees at his logging camp, at the agreed price of seventy-five cents per day per man; that there is a balance due of $1,047.51, and that the services were rendered in assisting in obtaining and securing logs, spars, etc. The complaint further alleges the filing of a notice of lien and the nonpayment of the claim, and prays for a personal judgment against the appellant, the foreclosure of the lien, a sale of the property, and the application of the proceeds of the sale to the payment of the judgment. A general demurrer having been interposed and overruled, issue was joined by answer. A personal judgment was entered in favor of the respondents and against the appellant for $1,018.31, with legal interest and costs.

The appellant contends, (1) that there is a fatal variance in that the complaint alleges an express contract and the evidence, if it establishes any liability, discloses that the appellant is liable upon a *quantum meruit* or upon the principle of estoppel; and (2) that the evidence does not disclose any liability upon the part of the appellant. In view of our conclusion upon the evidence, these questions will be considered together. A careful reading of the evidence has con-

vinced us that the appellant agreed to pay the respondent Ora Bell Dolan for furnishing supplies and board for his men, as alleged. While the evidence is conflicting, we think the learned trial court was right in his conclusion that it preponderates in favor of the respondents. A discussion of the evidence would serve no good purpose.

At the close of the respondents' evidence, the appellant moved for a dismissal of the action, on the ground that the lien had not been established, and upon the further ground that the right to a personal judgment was not shown. The denial of the motion is assigned as error. It is contended that, when the respondents failed to establish a lien, the court lost jurisdiction to proceed other than to enter a judgment of dismissal. It is argued that the method pursued deprived the appellant of a trial by jury, that the case should be remanded with directions to dismiss the action, and that the respondents should be required to pursue their remedy at law. This position is not tenable. The respondents in good faith claimed a lien under the provisions of Rem. & Bal. Code, § 1162. Rem. & Bal. Code, § 1172, provides that liens upon sawlogs etc., shall be enforced by a civil suit in the superior court of the county where the lien is filed, and shall be governed by the laws regulating proceedings in civil actions. Section 1179 provides that, in a civil action, a judgment must be rendered in favor of the person having a lien for the amount due him; that the court shall order the property subject to the lien to be sold, and that the proceeds of the sale shall be applied upon the judgment. We have repeatedly held that, where a lien is asserted in good faith but not established, the court retains jurisdiction for the purpose of determining the rights of the parties and entering an appropriate judgment. In the recent case of *Pacific Iron & Steel Works Co. v. Goerig*, 55 Wash. 149, 104 Pac. 151, the respondent had performed work and labor in repairing a steam shovel, and sought to enforce a lien for the sum due him under Laws 1905, page 137 (Rem. & Bal. Code, § 1155). The lien was

denied, and a personal judgment entered in his favor for the value of his services. It was contended that, when the lien failed, the action became one at law which a court of equity had no jurisdiction to determine. In answering this contention, we said:

"The court unquestionably had jurisdiction of the action and the right to proceed with its trial upon the merits. If the appellant had asked for a jury trial on the legal questions involved after the appellant had abandoned the lien, the trial court might properly have granted the motion even to the extent of postponing the trial to a later time, especially as the respondent introduced no evidence to establish its lien, but no error was committed in refusing to dismiss for want of jurisdiction."

In *Hildebrandt v. Savage*, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109, an action to foreclose a lien for material furnished and labor performed, the trial court held the lien invalid, but rendered a personal judgment for the amount found due under the contract. It was urged that the court erred in entering the judgment. In passing upon this contention, it was said:

"We are also of the opinion that, to take advantage of this on appeal, appellant must have raised the question at the trial . . . either by objecting to the action's proceeding in equity or by demanding a trial by jury."

In *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108, an action foreclosing a materialman's lien, the right to a lien was denied, and a personal judgment was entered against the party in default, but denied as to another. This was held error, the court saying:

"The defendants entered upon a trial as to the merits of the case, . . . without any objection or any demand to have the case tried by jury,"

and that a judgment should have been rendered against the contractors for the amount found to be due for the materials, notwithstanding the fact that the lien was not established. In *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721, it was held

that, where nonlienable items are inserted in a lien in bad faith, it was not error for the court to dismiss the action and require the parties to pursue their remedy at law. In that case the plaintiffs sought to establish and enforce a lien for $110, for cutting one hundred and ten acres of grain at one dollar per acre, $60 damages for loss of profits, and $60 damages for loss of time on account of a breach of the contract by the employer. The court said: "The evidences of bad faith are so clear that the whole claim should fail." We think the true rule is stated in 27 Cyc. 433, as follows:

"As a general rule a personal judgment in favor of the claimant against his debtor may be rendered even though the claimant fails to establish or maintain his alleged lien; but where the jurisdiction of the court in which the action is brought rests upon the fact that the action is upon the lien for the foreclosure thereof, the amount in controversy not being such as would support the jurisdiction of the court in an action founded upon the demand alone, if the lien fails the court cannot render a personal judgment on the claim."

We think that the statute under which the lien was claimed contemplates the entry of a personal judgment, without regard to whether the lien is established. But in any event, as we have frequently said in discussing kindred subjects, there is but one form of action in this state—a civil action. Whether the action is prosecuted in equity or at law, it is tried in the same court, and it would seem to be illogical to hold that, if the lien fails, the action should be dismissed, to be commenced again in the same court with the equity features of the case eliminated. The better rule is that the court should retain jurisdiction and enter an appropriate judgment. The appellant did not demand a trial by jury. Had he done so after the lien failed, and had his request been denied, a different question would be presented. Had the action been on the law side of the court, the appellant would not have been entitled to a jury trial without a demand therefor and a compliance with the statute. Rem. & Bal.

Code, § 316. It is apparent that he would have no stronger right to a jury trial in a case brought upon the equity side of the court. The court had jurisdiction of the subject-matter, whether at law or in equity, under the constitution.

The appellant relies upon *Thompson v. Allen*, 56 Wash. 582, 106 Pac. 173, and *Modern Plumbing & Heating Co. v. American Soda Fountain Co.*, 57 Wash. 148, 106 Pac. 628. In the case last cited, the question as to the right of the plaintiff to a personal judgment was not before the court, the debtor party not having been served with process. *Thompson v. Allen* was decided without reference to the case of *Pacific Iron & Steel Works v. Goerig*, which had not been published in book form and was not cited. When the rule was announced in the earlier cases in this court, that a personal judgment could be entered in lien cases when the lien failed, the statute guaranteed to litigants a jury trial in all law cases without any request therefor. If the rule was then sound, that a jury trial was waived in such cases unless demanded, the conclusion is irresistible that, under the present statute, no error is committed in the entry of a personal judgment in an equity case unless, upon the failure of the lien and before final judgment, there is a specific demand for a trial by jury, and a compliance with the statute in other respects.

One Jennie Nichols was allowed mileage and witness fees in the sum of $2.20. The cost bill including this item was filed in due time, verified by the oath of counsel, stating that the items were true and correct and that the disbursement was necessary, and the witness signed the docket as required by statute. The court, in denying the motion to strike this item, found that the witness was in attendance at the trial at the request of the respondents, and was not called to testify because the respondents' attorney concluded that the course of the trial made her testimony unimportant. It is contended that the witness was not entitled to her fees, she not having been subpoenaed. Rem. & Bal. Code, § 482, pro-

vides that the prevailing party shall be allowed for all necessary disbursements including fees of witnesses, and that the disbursements shall be stated in detail, verified by affidavit, served upon the opposite party or his attorney, and filed with the clerk of the court within ten days after judgment; provided that no fees or mileage for any witness shall be taxed in a cost bill unless they shall have reported their attendance at the close of each day's session to the clerk. In *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018, it was held that the prevailing party was entitled to costs, for a witness who attended the trial and testified therein without the service of a subpoena upon him. In *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467, it was held that witnesses who are present at the trial at the instance of the prevailing party, although they did not testify, were entitled to their fees as costs. The opinion does not state whether they had been subpoenaed. In *McCleary v. Willis*, 35 Wash. 676, 77 Pac. 1073, we held that costs were taxable for a witness who was in attendance in obedience to a subpoena but who did not testify. We think the item was properly allowed. If the respondents believed in good faith that the testimony of the witness would be desired, they had the right to procure her attendance, either by the service of a subpoena or by her voluntary appearance. The fact that the case took such form as to render her testimony immaterial, does not deprive the prevailing party of the right to have her mileage and per diem allowed as costs. See, also, *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

The judgment is affirmed.

Rudkin, C. J., Fullerton, Chadwick, and Morris, JJ., concur.

[No. 8760. Department Two. July 2, 1910.]

DAVID R. CARSON *et al.*, *Appellants*, v. DONALD C. BUNN, *Respondent*.[1]

APPEAL—BOND—AMOUNT. Where the bond on appeal, conditioned also as a supersedeas, is for less than double the judgment and $200 additional, the appeal will be dismissed.

Appeal from a judgment of the superior court for Benton county, Neal, J., entered December 18, 1909. Dismissed.

J. W. Callicotte, for appellants.

Linn & Boyle, for respondent.

PER CURIAM.—This was an action to recover damages for breach of an oral contract for a year's services to commence at a future day. The court below held that the contract was nonenforceable under the statute of frauds, and entered a judgment of dismissal, from which this appeal is prosecuted.

The judgment of dismissal awarded costs against the appellants in the sum of $22, and the appeal bond is in the sum of $200, conditioned both as a cost and as a supersedeas bond. The respondent has moved to dismiss the appeal on the ground that no sufficient appeal bond was filed, and under repeated rulings of this court the motion must be granted. *Hassett v. Fraternal Brotherhood, ante* p. 161, 109 Pac. 305, and cases there cited. Appeal dismissed.

[1]Reported in 109 Pac. 797.

[No. 8649½. Department One. July 2, 1910.]

OKANOGAN VALLEY BANK, *Respondent*, v. JACKSON EVANS *et al.*, *Appellants*.[1]

APPEAL—BOND—AMOUNT. Where the bond on appeal, conditioned also as a supersedeas, is for less than double the judgment and $200 additional, the appeal will be dismissed.

APPEAL—REVIEW—EXCEPTIONS. The evidence will not be reviewed in the absence of exceptions to the findings of fact.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered September 11, 1909, upon findings in favor of the plaintiff, in an action on a promissory note, after a trial on the merits before the court without a jury. Dismissed.

Alvin W. Barry and *Perry D. Smith*, for appellants.

William C. Brown, for respondent.

PER CURIAM.—A judgment was entered in this case for $250, the amount of the principal of a promissory note, $68.10 interest, and $43.30 costs, making in the aggregate $361.40. A bond was given in the sum of $800, conditioned both as an appeal and a supersedeas bond. It should have been given for double the amount of the judgment and costs, plus $200, the amount required for an appeal bond. The case was tried to the court as an action at law, and findings of fact were made and filed in the cause. No exceptions were taken to the findings.

The respondent moves to dismiss the appeal for the reasons stated. The motion must be sustained. The bond is not in form or substance such as to render the appeal effectual. *Hassett v. Fraternal Brotherhood*, *ante* p. 161, 109 Pac. 305; *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999; *Beezley v. Sessions*, 22 Wash. 125, 60 Pac. 130; *Galloway v. Tjos-*

[1]Reported in 109 Pac. 795.

sem, 22 Wash. 103, 60 Pac. 129; *Sumner v. Rogers*, 21 Wash. 361, 58 Pac. 214; *Hawthorn v. Washington & Great Western R. Co.*, 33 Wash. 707, 74 Pac. 1135; *Winchester v. Morris*, 33 Wash. 706, 74 Pac. 861. Where there are no exceptions to the findings of fact, the evidence will not be reviewed. *Cornthwaite v. Barrington Transportation Co.*, 55 Wash. 389, 104 Pac. 609.

Dismissed.

[No. 8234. Department One. July 2, 1910.]

JAMES C. BROAD, *Appellant*, v. THE CITY OF SPOKANE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS — ORDINANCES — EQUITY — POWERS OF COURT. A court of equity cannot interfere with the enactment of ordinances because it questions their expediency, or the motives of the council, or the regularity of the proceedings.

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ABANDONMENT — INJUNCTIONS — REMEDY AT LAW. A court of equity will not restrain a city council from abandoning a local improvement after entering into a contract therefor, as the contractor has his remedy at law.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 17, 1909, upon sustaining a demurrer to the complaint, dismissing an action in equity. Affirmed.

Cullen & Dudley and *John Clark*, for appellant.

E. O. Connor and *Bruce Blake*, for respondents.

PER CURIAM.—Acting pursuant to the charter and ordinances of the city of Spokane, the board of public works of that city filed with the city council plans and specifications for a sewer which the city contemplated constructing. These plans and specifications the city council adopted by

[1]Reported in 109 Pac. 1014.

resolution at a meeting held on March 10, 1908. The sewer was estimated to cost $81,591.90. On April 28, 1908, the city council, by ordinance, ordered the construction of the proposed sewer according to the plans and specifications adopted, and provided therein that the cost of construction should be paid by assessments upon the property benefited. The ordinance further provided that the improvement should be made under the supervision of the board of public works, which was authorized to receive bids and let the contract for the same, further providing:

"No contract herein provided for shall go into effect, in so far as the city is concerned, or be binding upon it, until the assessments herein provided for shall be confirmed; and, in the event the assessments and assessment roll herein provided for shall not be confirmed, then such contract shall be of no further force and effect." Spokane Ordinance, No. A 3,388, § 7.

Thereafter the board of public works advertised for and received bids for the construction of the sewer, among which bids was the bid of the appellant offering to construct the sewer, according to the plans and specifications submitted, for the sum of $67,965. The appellant's bid proved to be the lowest and best bid for the work and was accepted, and a contract therefor was thereafter let to him. This contract, following the ordinance authorizing it, contained the following provision:

"It is further mutually covenanted and agreed, between the parties hereto, that this contract shall not be binding upon the first party (the city) or go into effect, in so far as it is concerned, until the assessments and assessment roll provided for in said ordinance No. A 3,388 shall have been confirmed by the city council of the said first party, and in event said assessments and assessment roll shall not be confirmed by said city council, then this contract shall be void and of no further force and effect."

The board of public works thereupon proceeded to make the required assessment, completing and filing the roll with the

city council in due course, whereupon a day certain was fixed by the council for hearing protests and objections thereto. At the hearing appointed, a protest against approving the assessment roll was filed by some sixteen taxpayers of the district, among whom was a member of the city council. On motion of the councilman signing the petition, a resolution was passed by which the council refused to confirm the roll. At a subsequent meeting the board of public works was instructed by the council to prepare amended plans and specifications for the sewer. This the board did by changing the depth of the outlet of the sewer and making other minor changes. The estimate of the costs of the sewer under the amended plans was $57,028. These plans were adopted by the city council and an ordinance introduced for the construction of the sewer according thereto. This ordinance was afterwards duly passed and approved, whereupon the board of public works advertised for bids for the construction of the sewer under its provisions, and was proceeding therewith when this action was begun.

In addition to the foregoing facts, the appellant in his complaint charged the council with proceeding irregularly, in that the purported amended plans and specifications for the sewer were not the plans of the board of public works itself, but was wholly the work of its secretary; that the ordinance adopting the amended plans and specifications was not read in full when introduced, but by title only; that the ordinance was not complete at that time, but merely the stereotyped blank for such an ordinance without the blanks being filled; and that all of the acts of the city council subsequent to the return of the assessment roll were in excess of its powers and therefore void.

To the complaint the respondents demurred on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and on the appellant's election to stand thereon, judgment of

dismissal and for costs was entered. This appeal was taken therefrom.

While the complaint challenges the regularity of the proceedings of the city council, and questions the motives of one of its members, these are not matters that can be considered by the court in proceedings of this nature. A court of equity has no rightful authority to interfere with the enactment of municipal ordinances merely because it may question the expediency of the measures, the motives inducing their enactment, or the regularity of the proceedings by which they are being enacted; it is limited solely to an inquiry into the question of power. *State ex rel. Rose v. Superior Court of Milwaukee County*, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819.

That the city had power to abandon these proceedings at the time it did abandon them, we think there can be no question, even though such abandonment resulted in a breach of contract with the appellant. The power is deducible from the general powers of the city; in fact from the power to proceed with the work. If this were not so there could be no relief from improvident undertakings. The city could not, under the appellant's view, abandon the work of constructing this sewer on the return of the assessment roll even though it then discovered that the sewer would not when completed perform its functions and must be immediately destroyed. We cannot think that the city is thus helpless.

Holding as we do that the city had power to abandon the undertaking, we cannot inquire into the reasons for its exercise. If the appellant has a remedy it is by an action at law for damages. Any other rule might result in the court's compelling the city to complete a useless or wasteful structure.

We think, however, that the question whether or not there was an actual breach of contract or a remedy for its breach should not be determined in this proceeding. The dismissal

of the action below, therefore, will be treated as a dismissal without prejudice, and with leave to the appellant to bring an action for damages if he so desires.

[No. 8616. Department Two. July 2, 1910.]

MABEL GORDON, *a Minor, by Marion L. Gordon, her Guardian Ad Litem, Appellant*, v. SNOQUALMIE LUMBER & SHINGLE COMPANY, *Respondent.*[1]

NEGLIGENCE—DANGEROUS PREMISES—PLACES ATTRACTIVE TO CHILDREN—HOT WATER BARREL. The owner of a mill was not negligent in the maintenance of a barrel of hot water, so as to be liable for injuries to a child nine years of age, who was scalded when a plug came out while she was attempting to take water from the barrel, where it appears that the barrel was about three feet high covered with a lid, and accessible only from one side, that the plug was an ordinary cedar plug apparently sound, and there was nothing to show how it came to be removed, that the parents of the child had lived in the neighborhood, and with others used the water for domestic purposes, and permitted the child to go there and never anticipated any danger or warned her to keep away (DUNBAR, J., dissenting).

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 11, 1910, dismissing, at the close of plaintiff's case, an action for personal injuries. Affirmed.

Jackson Silbaugh, for appellant.

Brownell & Coleman and *Francis H. Brownell*, for respondent.

MOUNT, J.—This action was brought by the plaintiff, Mabel Gordon, a minor, by her guardian *ad litem*, to recover for personal injuries. At the conclusion of the evidence for the plaintiff, the trial court dismissed the case. The plaintiff has appealed from that order.

[1]Reported in 109 Pac. 1044.

The facts are substantially as follows: At the time of the appellant's injury, the respondent operated a shingle mill in the town of Snoqualmie, in this state. The mill was located on the right of way of the Northern Pacific Railway Company, to the east of the main track of that company. The appellant lived with her father and mother about one hundred and sixty feet west of the mill. The main line of the railway company ran between the mill and her home. The plaintiff was "going on ten years old." The mill company carried an exhaust steam pipe from its dry kiln a distance of one hundred and ten feet, where the pipe emptied into a barrel. This barrel was sixty feet from the nearest building and forty-eight feet east of the railway track. It was placed at the edge of an old mill pond which had become filled up with logs and debris. The barrel was accessible from the railroad track. It was full of hot water, from which steam or vapor constantly arose. The men from the mill used the water from the barrel for washing purposes, and people in the vicinity were accustomed to go there for water for domestic purposes. Children sometimes played near the barrel and took water therefrom. A cover was kept on the barrel. About the middle of the barrel, a wooden cedar plug was placed in the bunghole of the barrel. There was no rail or guard around the barrel, and no notice warning people away. It simply stood by the pile of debris, and was readily accessible to any one who desired to go to it from the direction of the railway track.

On July 2, 1907, the mother of the appellant started from her home on the west of the railway track to go to the barrel for a pail of hot water. While on her way, she was stopped by a neighbor woman, and she placed her bucket down upon the ground. The little girl took up the bucket and ran on to the barrel and, while in the act of dipping water from the barrel, the plug came out and hot water poured on her leg, scalding the limb from the knee down. After the child was taken home, the father went over to the

barrel and picked up the plug, which he testified was wrapped with some kind of burlap which was rotten. The plug was a solid cedar plug, about six inches long and two inches in diameter at one end and one and one-quarter inches in diameter at the other. The little girl had taken water from the barrel before to wash doll clothes and to wet sand with. She had also played around there with other children. The men running the mill had seen her there often, and she had never been told to keep away.

It is argued by counsel for appellant that the barrel of hot water was an attractive nuisance and the danger to children should have been contemplated, and that the question of negligence of the respondent was therefore one for the jury. Cases are cited to the effect that appliances not in themselves dangerous may be exposed in such a way as to become dangerous and render the owner liable for injuries caused thereby. *McAllister v. Seattle Brewing & Malting Co.*, 44 Wash. 179, 87 Pac. 68, and *Kinchlow v. Midland Elevator Co.*, 57 Kan. 374, 46 Pac. 703, are relied upon. The first of these cases was where a sheave wheel over which a cable operated was located in a place where people were accustomed to travel. The wheel was stopped and started at intervals. A boy upon the street saw it and placed his foot upon the slowly moving cable, when it started up rapidly, and the boy's foot was drawn between the cable and the pulley. We held in that case that the question whether the sheave wheel was dangerous or attractive to children and must have been forseen was one for the jury. In that case we said:

"Where the dangerous machinery is connected with an ordinary manufacturing plant, and so surrounded with the ordinary safeguards as to legitimately lead to the conclusion that children of immature years unattended will not approach it, the owner or operator owes no such duty of active vigilance to possible trespassing children as required him to keep a guard over the premises; and hence is not responsible if a child does approach and meet with injury from such machinery. . . . On the other hand, we have held

that, where dangerous machinery and dangerous substances, of a character likely to excite the curiosity of children and allure them into danger, have been left unguarded in exposed places close to the highways, or playgrounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner or person leaving the dangerous machinery or substance is liable for such injury."

We think the case at bar falls within the principle of the first rule there stated. The barrel of hot water was connected with an ordinary manufacturing plant. It was so surrounded as to appear absolutely safe. It was a wooden barrel, apparently three feet high by about eighteen inches in diameter. It was covered with a lid. Steam or vapor was issuing from it at all times, and sometimes water was bubbling over the sides. It was accessible only from one side, while the other sides were surrounded by debris. The approach to it was by walking a large, flat timber, upon one end of which the barrel was standing. The little girl, while of the age of nine years, knew that the water was hot, had used it before, and had been there frequently. Her parents, of course, knew that the water in the barrel was hot. They knew the location and condition of the barrel, and they permitted her to go there, and had never warned her to keep away. This shows conclusively that they did not apprehend any danger, and there is no evidence in the record showing that any one supposed or considered the barrel dangerous. The inference is that it appeared safe. In other words, the barrel of hot water was so surrounded with ordinary safeguards that it was apparently safe and would not be supposed to be dangerous even for children to play around; not even the parents of the child who went there anticipated danger. Under such circumstances it cannot be held that the respondent was bound to apprehend danger which was not apparent. It is true that children had upon previous occasions played near the barrel, and that they had taken water from the barrel.

It may be conceded that they were lured there, and it may also be conceded that the hot water was dangerous. Still the evidence does not show that the water was unguarded, or exposed in such a way as to render the respondent liable. The barrel was a substantial one, securely placed, and covered in plain view. There was no element of a trap about it. The plug which came out is a substantial one and, so far as the evidence shows, may have been removed and insecurely replaced by some one a short time before the accident. It is not shown what caused the plug to come out, and there is no showing of notice, or opportunity of notice, to respondent of a defective condition of the barrel or the plug. Under these circumstances it cannot be held that the case falls within the rule upon which the *McAllister* case was based, or upon the rule of safe place, or of a trap, as in the Kansas case. It falls within the rule of *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; and *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. 847, where the owner would not ordinarily apprehend danger.

The barrel of hot water in this case cannot be held to be an attractive nuisance. It is true the water in it was hot, but this fact caused steam or vapor to arise from it at all times, and consequently was a warning to even a child of the tender age of nine years that the water would burn if she came in contact with it. The fact that the water was hot would tend to prevent children playing in it, much more so than if the water were cold or merely warm. If this barrel had contained cold water, it could not be held to be an attractive nuisance. If the barrel of water in this case may be held to be inherently dangerous, so as to belong to that class of cases where owners are liable for accidents to children, then the barrel of rain water, or the pond, or the cherry tree, or a fire on a vacant city lot near where children are accustomed to play, is an attractive nuisance, and if children are drowned or injured therein the owners of such lots

are liable. Such, of course, is not the rule. In *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148, the court said:

"Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie v. McGowan*, 100 Pa. St. 144, this rule 'would charge the duty of the protection of children upon every member of the community except their parents.' A very onerous duty!"

We think the barrel was not of such a nature as to require the respondent to anticipate danger, and therefore the trial court correctly dismissed the case. The judgment must be affirmed.

RUDKIN, C. J., CROW, and PARKER, JJ., concur.

DUNBAR, J. (dissenting)—I dissent. It seems to me, from the statement of the case presented in the majority opinion, that the judgment ought to be reversed. The testimony shows that the children in the neighborhood used this ground for playing purposes; that this fact was known to the operators of the mill, as was also the fact that water from the barrel was used generally by the settlers in the neighborhood. The argument is that the barrel of hot water was so surrounded with ordinary safeguards that it was apparently safe, and that it would not be supposed to be dangerous. Of course, if there had been an apparent danger, then the element of contributory negligence would enter in, and there could be no recovery. But the fact that it was not apparently dangerous, and was dangerous in fact, throws the burden of ascertaining the danger upon the party who placed it there, was operating it, and was responsible for it.

The evidence does not show in what manner the plug was removed. The child was so badly hurt at the time the accident occurred that she was not able to remember anything very definitely about it, except that the water poured out on her and injured her when she was attempting to get water. It may have been that the plug was so loosely maintained there that, in brushing against it, it came out. It may have been that she stepped on it, to aid her in getting to the top of the barrel for the purpose of getting water. But, in any event, it proved to have been dangerous, and a view of the plug is convincing that it was, at least, a very rude and insufficient fastening to a barrel of scalding water in a place which was frequented by the neighborhood, and by the children of the neighborhood who were known to play around it, who used it to wash their doll clothes in, and to wet sand for the purpose of making sand houses.

The opinion relies largely upon *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148, but all that is said in that case was the purest dictum. That was a case where a child was drowned in a reservoir belonging to the city of Wheeling, and the court decided that, in the absence of a statutory provision, the city was not liable, under the theory that, where a city under the authority of the general law, undertakes a work for the sole use and benefit of the public, it is not liable for an injury caused by negligent or defective act of its servants, unless some statute, either directly or by implication, gives a private remedy; and there being no statute in that state giving a private remedy, the court held that the action could not be maintained. So that it was not necessary to discuss the question of liability, so far as the negligence of the city was concerned. The writer of the opinion, though, saw fit to go outside of the necessities of the case, to deliver a discursive, flowery, and poetical dissertation on the allurements in nature which beset children, a portion of which is presented by the majority opinion. If this thought, which was solely the thought of the writer of

the opinion and for which the court was in no way responsible, were to be followed, it would logically follow that there could be no recovery for a damage to children where they had been lured into danger. But it would be safer and more satisfactory to practitioners, as well as clients, if this court would follow the principles enunciated in its own decisions, rather than those of courts where the general principles announced by this court have been repudiated, as in the case just cited. This court has taken the reverse of the view taken by the court in that case on every question discussed, and an examination of that case shows that many of the cases which were severely criticized in the opinion were cases announcing the principles which have been adopted by this court. This case, in my opinion, cannot be distinguished from *McAllister v. Seattle Brewing & Malting Co.*, 44 Wash. 179, 87 Pac. 68, where the two rules were announced as set forth in the majority opinion. But certainly the first rule announced, viz., that

"Where the dangerous machinery is connected with an ordinary manufacturing plant, and so surrounded with the ordinary safeguards as to legitimately lead to the conclusion that children of immature years will not approach it, the owner or operator owes no such duty of active vigilance to possible trespassing children as required him to keep a guard over the premises,"

is not applicable to this case. There is no question here of leading the owners of this plant to the legitimate conclusion that children of immature years would not approach it, for the testimony is to the effect that they did approach it, that the owners knew that they approached it, that it was an accommodation to the people of the neighborhood generally which was conferred upon them by the company, and that the use had gone to such an extent that it must be presumed that they were there by invitation of the owners. But, quoting again from the same opinion:

"On the other hand, we have held that, where dangerous

machinery and dangerous substances, of a character likely to excite the curiosity of children and allure them into danger, have been left unguarded in exposed places close to the highways, or play grounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner or person leaving the dangerous machinery or substance is liable for such injury."

This case falls squarely within that announcement. The dangerous place was left. The bubbling and steam of the water were visible and were likely to excite the curiosity of children. It was not safely guarded. If the barrel had been furnished with an ordinary faucet by which to turn the water on and off, it would have been some notice that the water would escape if the faucet were manipulated. But here the exhibit in the case shows that it was simply a bungling device which would naturally, if children were playing around it, result in the casualty which is the subject of this controversy. In discussing this question in the case just above cited, we further said, after reviewing some prior cases:

"The children injured in each case had no special license to be at the place where the injury occurred, nor did the owner of the articles or substance causing the injury owe to the children any special duty of protection or care. But the cases are rested on the principle that it is negligence in itself to leave, exposed and unguarded near the haunts of children, dangerous machinery or compounds which must necessarily result in injury to them if they come in contact with it. It matters not that the dangerous article may be on the premises of its owner, or that the injured person must become technically a trespasser to approach it. It is enough that the thing is dangerous in itself, and is attractive and alluring to children, and has been left exposed and unguarded in a place where it must reasonably have been anticipated that children would be attracted to it, and tempted to play with and handle it;"

an altogether different sentiment from the uncalled for expression of opinion by the judge who wrote the opinion in the *Wheeling* case. It seems to me that this is a stronger case in favor of reversal than that case, for there the boy

was passing over the plant of the brewing company, and here the child was simply doing what the whole neighborhood had license to do, viz., trying to obtain water from this barrel.

The judgment, in my opinion, should be reversed, and the case allowed to go to the jury.

[No. 8523. Department Two. July 5, 1910.]

Washington Safe Deposit and Trust Company, *Respondent*, v. Paul Lietzow, *Appellant*.[1]

Death—Evidence—Sufficiency. The death of a person is sufficiently established by evidence that it was publicly announced in the daily papers of the city, and an undertaker testified that he had embalmed and shipped a body coming into his custody as that of the deceased.

Mortgages—Absolute Deed—Evidence—Sufficiency. The fact that a deed, absolute in form, was intended as a mortgage must be established by clear, satisfactory and convincing evidence, and is not shown where the grantor was indebted to the grantee, and conveyed to a trustee who had full power to sell for the amount of the debt, which was done, and no note or written evidence of the indebtedness was given.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 24, 1909, upon findings in favor of the plaintiff, in an action to quiet title, after a trial on the merits before the court without a jury. Affirmed.

Munter & Lovejoy, for appellant.

Cullen & Dudley and *Joseph Rosslow*, for respondent.

Crow, J.—Some years prior to 1904, Paul Lietzow was paid $1,000 by the Hamburg-Bremen Fire Insurance Company, and $500 by the Liverpool, London & Globe Fire Insurance Company, upon two separate policies of insurance for losses on property destroyed by fire. Early in 1904 he, claiming to be actuated by conscience, informed the insurance

[1]Reported in 109 Pac. 1021.

companies that he had burned the property to secure the insurance, and that he desired to make restitution. He then held a written contract for the purchase of eighty acres of land in Spokane county from the Northern Pacific Railway Company, upon which $80 of the consideration remained unpaid. On May 11, 1904, negotiations took place between him and one Harry C. Boyd, who represented the insurance companies, with the result that Lietzow assigned the contract of sale to Boyd as trustee for the companies. The contract was never recorded. The insurance companies paid the remainder of the purchase money, and the Northern Pacific Railway Company executed and delivered a deed to Harry C. Boyd, trustee. Thereafter Harry C. Boyd, at the request of the insurance companies, conveyed to Rudolph Herold, Jr., who held as their trustee. Although Boyd was a married man, his wife did not join in his deed. Later the Washington Safe Deposit and Trust Company, a corporation, the plaintiff herein, purchased the land from the insurance companies, taking a deed from Rudolph Herold, Jr., and caused its attorneys to examine the title. They called plaintiff's attention to the fact that the records failed to disclose any express trust; that the word "trustee" written in the deeds might have been used as description only; that the land might in fact have been the community property of Boyd and wife, and that quitclaim deeds should be obtained to quiet the title. Efforts were made to obtain these deeds, during which plaintiff learned of Lietzow's former connection with the property. In the meantime Boyd had died intestate, leaving a widow and heirs at law. To quiet its title plaintiff commenced this action against Paul Lietzow, the insurance companies, the widow and heirs of Boyd, and all unknown persons and parties claiming any right, title, estate, lien or interest in or to the land.

After service all the defendants were defaulted except Paul Lietzow who, answering, in substance alleged, that on August 11, 1904, he held the contract to purchase from the

Northern Pacific Railway Company; that he was indebted to the insurance companies in the sum of $1,738.33; that they requested him to assign the contract to Harry C. Boyd so that he might obtain and hold the title until such indebtedness should be discharged; that Boyd was acting as trustee and agent for the companies in obtaining security; that Lietzow assigned the contract for that purpose only; that thereafter the companies paid $62.40 principal and interest remaining due on the purchase price; that the railway company thereupon executed and delivered a deed to Boyd as trustee, who conveyed to Rudolph Herold, Jr., to hold as his successor for the insurance companies, and that Herold, for the purpose of defrauding Lietzow, conveyed to the plaintiff corporation, which at the time had knowledge of all the facts, and of Lietzow's interest. The plaintiff, in its reply, alleged that the transfer and deed to Boyd as trustee were absolute and not a mortgage. The trial court made findings in favor of the plaintiff and entered a decree quieting its title. The defendant, Paul Lietzow, has appealed.

The appellant, in substance, contended that the transactions between him and Harry C. Boyd, which resulted in an assignment of the contract of sale to Boyd and a subsequent conveyance of the title to him as trustee by the Northern Pacific Railway Company, created the relation of mortgagee and mortgagor between him, as trustee for the insurance companies and the appellant, and that he and his assignees thereafter held the title as mortgagees securing appellant's indebtedness. The trial court held that the absolute title had passed. Appellant, by his assignments of error, contends that the trial court erred (1) in not permitting him to testify to conversations between himself and Boyd, whose death had been alleged by respondent, and (2) in failing to hold that Boyd took the title as mortgagee in trust for the insurance companies.

Respondent introduced evidence to show that Boyd died prior to the commencement of this action, and appellant now

contends that it was insufficient to establish the fact of his death. We hold it sufficient. His death was publicly announced in the daily papers of Spokane, was commonly reported and discussed in that city, and an undertaker, called as a witness for respondent, testified that he had embalmed and shipped a body which came into his custody as the body of, and under the name of, Harry C. Boyd.

As to appellant's second contention, we think the evidence shows that the transfer made to Harry C. Boyd, trustee, was an absolute conveyance. No note or obligation was given by appellant to Boyd, or to the insurance companies. While it is true that Lietzow's original indebtedness and the expenses incurred by the company were figured and ascertained, and that an unsigned memorandum stating the same was left with Lietzow by Boyd, we nevertheless conclude from all the evidence that the absolute title to the property was transferred to Boyd as trustee, with power to sell and convey. The evidence shows that the sale to respondent was made for a fair, adequate, and valuable consideration, without collusion or fraud. Before a deed absolute in form will be adjudged a mortgage, clear, satisfactory, and cogent proof must be produced to establish the fact that it was given as security for an indebtedness, and that both parties so intended. *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Sahlin v. Gregson*, 46 Wash. 452, 90 Pac. 592. We look in vain throughout the record for any direct, clear, satisfactory, or convincing evidence that the transfer was intended to be, or was, a mortgage. Boyd was dead, and the appellant was not permitted to testify to the negotiations between them which resulted in the assignment of the contract, and the execution of the deed by the Northern Pacific Railway Company. The only other person present at the negotiations was one Weister, a friend of the appellant, who testified as follows:

"Mr. Boyd stated that all his company desired was just simply to be paid the amount paid for the insurance, and Mr.

Lietzow was to turn over certain lands to them for this purpose. Mr. Boyd thought that the land, possibly, was not sufficient to balance his claim, but he would hold the land until it would—or sell off that land, and whatever was over and above that would satisfy their claim, was to be returned to Mr. Lietzow."

This statement, if it indicates anything, shows that Boyd was to take the title with power to sell and convey. That is precisely what he and Herold did. The presence of Weister at the negotiations had been requested by appellant who called him as a witness. Yet he makes no statement showing, or tending to show, that the transaction was intended as a mortgage. On the contrary, his evidence indicates that it was not so intended. Boyd's power to sell and convey and the absence of any written obligation executed by appellant are inconsistent with the mortgage theory. No note or other written evidence of appellant's indebtedness was given by him. A deed absolute upon its face will not be held a mortgage except upon clear, convincing, and positive evidence. Had the parties intended this deed to be a mortgage, it would not have been difficult to execute some instrument or memorandum signed by one or both of them disclosing such intention. Appellant claims that some such instrument was signed and delivered to him by Boyd. He has been unable to produce it, although he did produce an unsigned memorandum in Boyd's handwriting not sufficient to sustain his contention. It seems strange that he should so carefully retain this useless memorandum, and at the same time misplace the one which would have established the rights he now seeks to enforce. The evidence was not sufficient to show a mortgage.

The judgment is affirmed.

Rudkin, C. J., Parker, Mount, and Dunbar, JJ., concur.

[No. 8590. Department One. July 5, 1910.]

P. P. NEWELL *et al.*, *Appellants*, v. R. H. YOUNG *et al.*, *Respondents*.[1]

JUDGMENT—BAR—MOTION TO VACATE—RES JUDICATA—ELECTION OF REMEDIES. The denial of a motion to vacate a tax judgment and sale because of invalidity of the proceedings, is *res judicata* and a bar to a subsequent action to quiet title and set aside the judgment and tax title on the same grounds; the motion being an election of remedies.

Appeal from a judgment of the superior court for King county, Main, J., entered June 30, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to vacate a tax deed and to quiet title. Affirmed.

Edward Judd, for appellants.

E. B. Palmer and *Thomas M. Askern*, for respondents.

FULLERTON, J.—On July 12, 1900, the respondent R. H. Young procured a certificate of delinquency for unpaid taxes levied in 1896 on certain real property situated in King county. He thereupon paid the taxes for the subsequent years, and on August 21, 1900, began an action to foreclose the lien of the certificate. The action was prosecuted to judgment and sale, at which sale Young became the purchaser, receiving a treasurer's tax deed for the property on September 2, 1904. The property in question was formerly owned by the Moore Land Company, a corporation, and was assessed in its name during the period mentioned. The Moore Land Company had, however, parted with its interest in the property as early as 1891, one Harriet Moore being the owner of the property at the time of the foreclosure proceedings. The Moore Land Company, was the only defendant named in the foreclosure proceedings, and while the judg-

[1]Reported in 109 Pac. 801.

ment recites that the summons "was regularly and duly served on the above named defendants as the law in such cases requires," the records show an attempted service by publication, void under the decisions of this court in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and subsequent cases following the rule there laid down.

On June 25, 1906, Harriet Moore conveyed such interest in the land as she then had to Newell H. Moore, who, on February 4, 1907, filed a written motion asking that the judgment of foreclosure be vacated and set aside on the following grounds: (1) that it did not appear that the summons in the foreclosure proceedings was ever served upon any of the defendants, nor that it was returned by the sheriff "not found" as to the defendants; (2) that it does not appear that any affidavit of nonresidence was filed in the cause as a basis for service of a summons by publication; (3) that the summons published is defective; and (4) that the judgment was entered less than sixty days after the last publication of the summons. This motion duly came on to be heard on its merits before the superior court, and was by that court denied. Subsequently Newell H. Moore conveyed the property to P. P. Newell, who with his wife began this action for the purpose of vacating the tax deed and quieting title to the property. The respondents had judgment in the court below, and this appeal was taken therefrom.

The trial court, on the authority of the case of *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, and the cases there cited, held that the appellants were estopped by the judgment on the motion to vacate from now questioning the validity of the tax foreclosure proceedings. The appellants, however, earnestly contend that the judgment on the motion is not *res judicata* of the present action, as the question now in controversy was not heard on the motion to vacate. But it seems to us that the question now before us was the sole question that was decided in that proceeding. The only ground upon which the present action can rest is the invalidity of the tax

foreclosure proceedings, and that was the very question presented by the motion to vacate. It is true that the present action suggests matters dehors the record going to show the invalidity of that judgment, while the motion to vacate the judgment was based on the face of the record. But this distinction cannot avail the appellants. A motion to vacate a judgment is a form of procedure specially provided for by the statutes in this state, and is one of the concurrent remedies by which a party may be relieved from an improvident or irregular judgment. Being a concurrent remedy, an election to pursue it operates as a bar to the subsequent pursuit of another remedy seeking the same relief. As we said in *Flueck v. Pedigo, supra*,

"The moving parties invoked the jurisdiction of the court to vacate the judgment and the order denying the motion is necessarily binding upon them. It is folly to claim that a party is not bound by an order denying relief which he himself prays for. The moving parties were before the court demanding relief, the court had full and complete jurisdiction of the subject-matter and the parties, and its decision is final until reversed, or set aside in some appropriate proceeding authorized by law. Nor does the fact that the original judgment was void change the rule. As well might it be claimed that the appellant may institute another action for the same relief upon the affirmance of the judgment appealed from. It is the order denying the motion to vacate that works the estoppel, and not the original judgment. The court does not hold the original judgment valid, but holds the parties estopped to challenge its validity."

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8786. Department One. July 5, 1910.]

J. S. Kinder *et al.*, *Appellants*, v. Peter Poulsen, *Respondent*.[1]

Contracts—For Digging Well—Abandonment—Expenses Incurred by Owner. Under a contract whereby plaintiff was to drill a well for defendant, the defendant to furnish the feed for horses, coal and board while drilling for water, the defendant, on abandonment of the contract by plaintiff, is entitled to recover expenses incurred for feed, coal, and board furnished for six weeks while plaintiff was fishing for tools lost in the well through his negligence.

Appeal—Review—Findings. Findings upon absolutely conflicting evidence will not be disturbed on appeal.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered August 9, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

Arthur McGuire and *G. G. Hannan*, for appellants.

Canton & Hensel, for respondent.

Morris, J.—Appellants brought this action to foreclose a lien upon lands of respondent for labor performed in drilling a well. The first agreement of the parties was contained in a written memorandum, whereby appellants agreed to drill the well one hundred feet at $2.50 per foot, respondent agreeing in addition to paying the $250 for one hundred feet, to move the machine from the railroad to his ranch, furnish coal, board the men and horses, and pay for casing at one dollar per foot. Work was commenced under this contract in August, 1907, and continued until the drill had reached a depth of one hundred and eighty feet, without producing water. At that depth the drilling tools became fast in the hole and, after a few days' unsuccessful effort to dislodge them, it was mutually agreed that the well should be abandoned at this lo-

[1]Reported in 109 Pac. 795.

cation, the appellants would waive any claim to the excess eighty feet, and respondent would pay them the $250 provided for in the contract, and that a new location would be selected and a new attempt made to find water.

At this point is where the conflict in the testimony commences. Appellants contend that they were to drill in the new location under the terms of the original contract, receiving $2.50 per foot until water was found, or such depth as respondent might elect to go in case no water was found; while respondent maintains that appellants agreed to go down six hundred and fifty feet, the capacity of the machine, unless water was reached at a less depth, for $2.50 per foot; but that nothing was to be paid unless water was found, nor in case the entire depth of six hundred and fifty feet was not reached in the attempt. Whatever the new contract was, appellants commenced drilling thereunder the last of September, and continued until some time in January, when the tools stuck in the well, and three weeks elapsed before they succeeded in freeing them. They again proceeded and, in a few days, the tools again stuck, and for about three weeks more, or up to March 13, they unsuccessfully endeavored to loosen them. At this time the hole was down five hundred and twenty-five feet, and appellants being out of coal, requested respondent to furnish some. Respondent inquired how long it would take to get the tools out. Appellants seemed unwilling to venture an opinion on that score, and after some further conversation and discussion as to who should furnish the coal necessary to remove the tools, the appellants asked for a settlement, which the parties were unable to agree upon. Appellants then stopped all work, leaving the tools in the well, and later filed their lien and brought this action. The court found with respondent as to the contract. He also found that appellants "did not prosecute the work with reasonable diligence, or complete it or any part of it within a reasonable time; nor did they operate their machine with the degree of skill, care, and prudence required by the implied terms of

the contract under the circumstances shown by the evidence. . . . and their negligence in this respect was a direct and proximate cause of the accident." Judgment was ordered for respondent in the sum of $82.50, upon two items of payment and expenditures for which, with others, respondent had prayed.

The errors assigned are exceptions to the findings and conclusions, which are in the nature of a written opinion by the trial judge, in which he recites his conclusions upon the law and facts, the reasons for the conclusions thus reached, with citation of authority in support thereof. Error is also assigned in one or two rulings in the admission of testimony. Without detailing the evidence, we concur in the conclusions reached by the trial judge, being of the opinion that his findings are amply supported. One additional reason suggests itself why the judgment should be affirmed, whatever the contract was, whether as contended for by appellants or by respondent. Coal was only to be furnished by respondent while appellants were drilling for water. Appellants had consumed two hundred and twenty days in the vain attempt to find water, entailing a large expense upon respondent in furnishing coal, boarding the men, and feeding the horses. From the time in January, when the tools were lost in the second hole, until March 13, when the work stopped, appellants had consumed about six weeks at the expense of respondent in the particulars above referred to, in fishing for tools lost, as the trial court finds, through their lack of skill. Respondent was justified under such circumstances in demanding some assurance of success before continuing his heavy burden of expense. No interpretation of either contract required him to furnish coal to appellants for six weeks while they were fishing for their lost tools. Such was not within the contemplation of either contract. We find no error in the admission or rejection of evidence.

The case is similar to that of *Bock v. Sorenson*, 53 Wash. 558, 102 Pac. 428, where an attempt was made to foreclose

a similar lien, and it was held that the findings on absolutely conflicting testimony would not be disturbed where there was evidence to support the findings. Upon the authority of that case and for the reasons above given, the judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 8597. Department Two. July 7, 1910.]

W. S. GILLILAND, *Appellant*, v. GERMAN-AMERICAN STATE BANK, *Respondent*.[1]

APPEAL—BOND—AMOUNT. An appeal will be dismissed where the bond, conditioned also as a supersedeas, is less than double the amount of the judgment and $200 additional.

APPEAL—FINAL ORDER. Appeal does not lie where a verdict was directed for defendant until entry of final judgment dismissing the case.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered October 26, 1909, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for damages. Dismissed.

A. B. Wiltse (*Samuel R. Stern*, of counsel), for appellant.

Lovell & Davis, for respondent.

PER CURIAM.—Action by W. S. Gilliland against the German-American State Bank, a corporation, to recover damages for its failure to devote funds to the payment and satisfaction of a certain mortgage lien. The trial judge directed a verdict in favor of the defendant. The plaintiff has appealed.

The respondent has moved to dismiss the appeal for want of a sufficient bond. The record is incomplete, containing no final judgment. There is nothing in the transcript to show that any final judgment or order of dismissal has been entered, hence there is no issue before us for consideration. The

[1]Reported in 109 Pac. 1020.

respondent in its answer brief makes the statement that a final order was entered, dismissing the action and awarding judgment in its favor for $33 costs. This statement is tacitly admitted by the appellant in the reply brief. Assuming that such a judgment was entered, the appeal would have to be dismissed, as the bond given in the sum of $200 is executed as an appeal and also as a supersedeas bond, and is insufficient in amount. Appellant cites *Bridge v. Calhoun, Denny & Ewing*, 57 Wash. 272, 106 Pac. 762, to sustain his bond and appeal; but an examination of the record in that case discloses the fact that there was nothing to supersede, as no judgment for costs appears to have been entered. This appeal cannot stand if no final judgment has been entered. *Yatsuyanagi v. Shimamura*, 57 Wash. 42, 106 Pac. 503. If one has been entered, as contended by respondent and conceded by appellant, the bond is insufficient. *Hassett v. Fraternal Brotherhood, ante* p. 161, 109 Pac. 305. In either event, the appeal must be dismissed. It is so ordered.

[No. 8782. Department One. July 7, 1910.]

MARTIN HOLM, *Appellant*, v. CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY *et al.*, *Respondents*.[1]

PLEADING — COMPLAINT—ALTERNATIVE ALLEGATIONS— CONTRACTS—VARIANCE. In an action for railroad construction work done, the plaintiff may plead in the alternative an express contract or an implied contract for the reasonable value, without being subject to an election; and proof of *quantum meruit* would not be a variance.

CONTRACTS—CONSTRUCTION—ESTOPPEL. A subcontractor for railroad construction work is not bound by the engineer's fixing a price for the removal of cement gravel, when it was encountered, the contract not having fixed the same, and is not estopped to recover the reasonable value by continuing work after receiving notice of the engineer's decision, he never having agreed to the same.

[1]Reported in 109 Pac. 799.

RAILROADS—CONTRACTOR'S LIEN—WAIVER. A subcontractor on railroad construction work does not waive his right to claim a lien by stipulating, in a contract headed "Pay for labor and material," that he will pay for all material and labor furnished by him, and save the principal contractors and the railroad company harmless from any loss for work or labor performed or liens arising from or growing out of any act done or suffered by him or his agents or servants; since no waiver of his own lien appears in clear, certain and unequivocal language.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered July 15, 1909, in favor of the defendants, dismissing an action on contract and for the foreclosure of a mechanics' lien, after a trial before the court without a jury. Reversed.

Hovey & Hale (*John H. McDaniels*, of counsel), for appellant.

H. H. Field, Geo. W. Korte, and *E. E. Wager*, for respondents.

GOSE, J.—The respondents Jacobson and Lindstrom, having a contract with their co-respondent for the construction of a portion of its roadbed in Kittitas county, entered into a contract with the appellant, whereby he agreed to do the construction work for the roadbed to the extent of about 3,600 feet. Failing to reach an agreement with them as to the amount due him upon the completion of the contract, the appellant brought this action to recover an alleged balance, and to establish and foreclose a lien against the right of way of the respondent railway company to satisfy the same. This appeal is prosecuted from a judgment of dismissal.

The printed contract between the appellant and the respondents Jacobson and Lindstrom fixed the prices for all material removed in the construction work, except cement gravel. There are three principal points presented for determination: (1) A question of pleading. (2) The appellant contends that he is entitled to be paid seventy-seven cents per cubic yard for cement gravel, whilst the respondents

insist that he is only entitled to fifty cents. (3) The appellant asserts a right to a lien upon the right of way of the railway company, whilst it insists that the right was waived either expressly or by necessary implication.

A proper understanding of the case requires a brief reference to the pleadings. After pleading the formal matters setting out the contract *in haec verba* and alleging performance, it is alleged, that the respondents Jacobson and Lindstrom agreed with the appellant to classify and pay for cement gravel as solid rock at the rate of seventy-seven cents per cubic yard; that the railway company agreed to pay the respondents the reasonable value of all cement gravel which he removed, and that "the reasonable worth and value of excavating the material known as cement gravel was and is the sum of seventy-seven cents per cubic yard." The averments as to the reasonable value and the agreement to pay seventy-seven cents per cubic yard were put in issue by the respondents, answering separately. The respondents Jacobson and Lindstrom alleged affirmatively that, in the course of the work, cement gravel was encountered; that this was not specifically mentioned in the contract, but that before it was removed it was agreed between the appellant and themselves that they would pay him fifty cents per cubic yard for its removal. It is conceded that the contract does not fix the price for the removal of the cement gravel.

The respondents first contend that, under the pleadings, it was not competent for the appellant to prove the reasonable value of removing cement gravel, but that he should have been limited to proof of the contract price; that the evidence admitted over their objection should not be considered, and that it constitutes a fatal variance. As we have seen, the appellant predicates his right to recovery both upon an express contract and upon a *quantum meruit*. A party may present his case in the alternative. The wisdom of the rule is apparent. In many cases a reasonable doubt may exist in the mind of the pleader whether there was an express contract

and, if so, whether his evidence is sufficient to establish it. In such cases a prudent pleader will so frame his pleading as to admit proof and to permit a recovery upon either ground. *Globe Light & Heat Co. v. Doud*, 47 Mo. App. 439; *Moore v. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 20 S. W. 975; *Beers v. Kuehn*, 84 Wis. 33, 54 N. W. 109; *Palmer v. Miller*, 19 Ind. App. 624, 49 N. E. 975; 9 Cyc. 749; Rem. & Bal. Code, §§ 299-301.

In *Beers v. Kuehn*, it was said:

"In the present case the complaint blends a cause of action upon express contract for the agreed price with a cause of action upon implied contract for the reasonable value of the work. The allegations are entirely sufficient to make a good complaint. . . ."

"Under the code system of pleading the plaintiff may sometimes allege the same cause of action in two counts, one on the special contract and the other on a *quantum meruit*, so as to meet any possible state of the proof, and where this is permitted the plaintiff cannot be compelled to elect on which he will go to the jury." 9 Cyc. 749.

The respondents during the trial moved to require the appellant to separate his causes of action, and to elect upon which cause he would rely. There was no error in denying this motion. There was but one cause of action against Jacobson and Lindstrom, consisting of the contract, its performance by the appellant, and its breach by the respondents.

The second question presented is the reasonable value of removing the cement gravel. Respondents contend that, when this element was encountered, the chief engineer of the railway company fixed the price for its removal at fifty cents per cubic yard; that this was communicated to the appellant; that he continued the work for about fifteen months and until the completion of his contract, and that he is estopped to claim a greater sum. The vice of this view is readily demonstrable. The appellant had contracted to excavate the right of way for a certain distance, but no price was agreed upon for this material. The law therefore fixed the price at its

reasonable value. The appellant had the right, and it was his duty, to complete the contract, and neither the respondent nor their officers could arbitrarily fix the value of the work.

The evidence makes it clear that the appellant never agreed to accept a fifty-cent rate, but, on the contrary, he always asserted that it was worth seventy-seven cents, the same price as solid rock. We think the evidence shows that it was reasonably worth seventy-seven cents per cubic yard to remove this material. It is true that there is a conflict in the evidence, more seeming, however, than real. The evidence shows that other subcontractors settled on a basis of fifty cents a yard. It shows, also, that they protested that the price was inadequate. Moreover, it appears that the appellant removed a much larger percentage of this material than the other subcontractors. Mr. Huson, an engineer and a railroad employee and contractor of wide experience, fixed its value at seventy-seven cents, and the evidence shows that both the division and the district engineers were endeavoring to get the railway company to fix a better price than fifty cents per cubic yard. The classification was, by the terms of the contract, submitted to the chief engineer of the railway company. However, he could not and did not give the material an arbitrary classification. The duty was upon him to honestly and reasonably classify the material that was removed. The engineers first classified this material as hardpan, the price of which was fixed in the contract; but, realizing that this was arbitrary and unfair, they changed the classification to cement gravel.

The contract between the appellant and Jacobson and Lindstrom provides:

"The subcontractor agrees to pay in full for all material by him furnished and for the labor by him employed upon the work or any part thereof, and to so contract for labor as to retain from the money due therefor the amount of the board bills, if any, contracted during the performance of such labor, and to pay such board bills with the money so retained, and to save the first party and the railway com-

pany free and harmless from any loss for work or labor performed or material or supplies furnished in the performance of the work under this agreement, and from every claim, demand, or lien arising from, or growing out of, any act or thing done or suffered by him, or his agents, servants, or subcontractors, and his or their employees in, about, or connected with the construction of the work aforesaid."

In the margin to this clause, printed in bold-faced type, are the words "Pay for labor and material." The railway company did not take a bond from Jacobson and Lindstrom, the principal contractors, and the appellant is claiming a lien under the provisions of Rem. & Bal. Code, § 1129 *et seq.* The railway company contends that the clause quoted operates as a waiver of the lien. We cannot assent to this view. The marginal note, "Pay for labor and material," was inserted either as the contractor's interpretation of the clause, or for the purpose of misleading the appellant. Under either view the language cannot be construed as a waiver of the lien. The entire clause preceding the words "every claim, demand, or lien," clearly refers to persons who might claim a lien under the appellant. He agreed that no lien should result from his failure to pay any labor employed or supplies furnished by him. We are not concerned with discovering the proper technical construction of the clause as a whole. It is true the appellant could waive his right to a lien. If it was desired that he should do so, the language employed should have been clear, certain, and unequivocal. The waiver could have been expressed in a few words so clear in meaning that no one could have misunderstood them. In *Davis v. La Crosse Hospital Association*, 121 Wis. 579, 99 N. W. 351, it was held that a stipulation for the delivery of the building "free from all claims, liens, and charges," called for the delivery of the building free from any lien, or claim for a lien, through or under the builder, but did not refer to, or waive, the builder's lien; and that all doubt should be resolved against the waiver, as the presumption is that the builder is not waiving a privilege of such great value. In *Nice v. Walker*, 153 Pa. St.

123, 25 Atl. 1065, 34 Am. St. 688, in reviewing and criticizing the earlier cases in that court, it was said:

"It [the waiver] should be so plain that every mechanic and materialman, though of limited education, can understand it at a glance, and not be compelled to submit its interpretation to a lawyer, with the risk of a decision against him in the court of last resort."

This case was cited with approval in *Concord Apartment House Co. v. O'Brien*, 128 Ill. App. 437. The respondents Jacobson and Lindstrom admit in their answer that the appellant removed 89,133 cubic yards of cement gravel. He is entitled to recover at the rate of seventy-seven cents per cubic yard, and has been paid at the rate of fifty cents. The balance is due him.

The judgment is reversed, with directions to enter a judgment for the balance, with legal interest from the date of the commencement of the action, for a reasonable attorney's fee, and costs, and to enter a decree foreclosing the lien for the same.

RUDKIN, C. J., FULLERTON, PARKER, and MORRIS, JJ., concur.

[No. 8688. Department One. July 8, 1910.]

M. O. REEVES *et al.*, *Appellants*, v. LUDWIG FLATH, *Respondent*.[1]

INJUNCTION—TO RESTRAIN TRESPASS—REMEDY AT LAW. An action for an injunction to restrain trespass upon land is properly dismissed where it appears that the issue to be tried is the right to possession under an unacknowledged lease and whether notice was duly given to terminate the tenancy; since plaintiff had adequate remedies at law.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered July 20, 1909, upon findings in favor of the defendant, after a trial on the merits before

[1]Reported in 109 Pac. 796.

the court without a jury, dismissing an action to restrain a trespass upon real property and for damages. Affirmed.

Southard & Southard, for appellants.

C. J. Lambert and *Daniel T. Cross*, for respondent.

Morris, J.—Appellants brought the action in March, 1909, claiming ownership and possession of certain agricultural lands in Grant county. It was further alleged that respondent had been a tenant at will of appellants during the years 1907 and 1908, and that in October, 1908, appellants gave him notice in writing, terminating his tenancy and requiring him to vacate the lands; that, disregarding such notice, respondent continued in possession of the lands, cultivating and seeding the same for the 1909 crop, which cultivation and seeding was alleged to be a trespass and of great detriment to appellants' ownership and right of possession, and was causing appellants irreparable injury; that by reason of respondent's trespass appellants had been damaged in the sum of $500, and a continuation of such trespass would result in greater damage. They then prayed for damages in the sum of $500, and for a temporary restraining order preventing respondent from interfering with or trespassing upon the lands, and that upon a hearing such order be made permanent. The restraining order was issued, and respondent appearing, filed an answer, and the cause went to hearing upon the merits, resulting in a dissolution of the restraining order and judgment for respondent. Whereupon this appeal was taken.

The court found that respondent was in possession under an unacknowledged lease executed by appellant M. O. Reeves alone, in February, 1905, whereby it was attempted to lease the lands to one Daniel Vetter for a period of five years from October 1, 1905; that in 1907 Vetter attempted to assign this lease to respondent, who thereupon went into possession with full knowledge and permission of appellants' agent; that appellants' agent had no authority to grant this per-

mission, but that appellants received and accepted the rent from respondent for the years 1907 and 1908. It was then concluded that respondent was not a tenant by sufferance, and could not be required to surrender possession on demand, as contemplated in § 8805, Rem. & Bal. Code; that the lease, though unacknowledged, providing for the annual payment of rent, respondent was a tenant from period to period as rent was payable, and that such a tenancy could only be terminated by a thirty-days' notice preceding the end of any given period; that the notice, given at an unknown day in October, was insufficient for that purpose, inasmuch as it could not terminate the tenancy ending September 30, nor could it be held that it terminated the tenancy on November 15, if the court should conclude that such date was the end of each yearly period, because of the provision of the lease that rent should be payable not later than November 15, the proof not showing the day of service other than some time in October. The court then ended its conclusions by holding that respondent was entitled to a dismissal because of failure to give notice of the termination of the tenancy.

Irrespective of the court's conclusions, its judgment of dismissal was right, as it clearly appears from the allegations of the complaint, and from the proof offered to sustain it, that appellants could not try out such issues in an injunction suit, there being plain, adequate, and speedy remedies at law, in which the rights of the parties could, and only could, be determined. The action for an injunction is not one to try out the right to the possession of property, nor the rights of landlord and tenant under any alleged form of tenancy. Neither was it the proper action to determine a question of trespass.

We therefore conclude that the judgment of dismissal was proper, and the same is affirmed.

Rudkin, C. J., Gose, and Chadwick, JJ., concur.

Fullerton, J., concurs in the result.

[No. 8629. Department Two. July 8, 1910.]

DEWEY CRABB, *a Minor, by His Guardian Ad Litem, T. Crabb, Appellant*, v. W. E. WILKINS, *Respondent*.[1]

EXPLOSIVES — NEGLIGENCE — CARE AS TO CHILDREN — EVIDENCE — QUESTIONS FOR JURY. It is for the jury to determine whether a well digger had exercised the highest degree of care in the use of dynamite in a locality where children congregated, where it appears that his operations were carried on within ten feet of the usual route of school children who were accustomed to go from the school house to the post office during the noon recess, that on one such occasion school boys found four dynamite caps on the ground about twenty-five feet from the drill, that the defendant kept the caps in a tool box, only taking out such number as he desired to use, that they were often used by his workmen in his absence, and he had never cautioned or instructed them in regard to the care of the explosives; the inference being that the caps were left there as a result of the work and through the agency of the workmen (RUDKIN, C. J., dissenting in part).

Appeal from a judgment of the superior court for Adams county, Canfield, J., entered December 1, 1909, granting a nonsuit in an action for personal injuries sustained by a child through the explosion of dynamite caps. Reversed.

W. W. Zent and *John M. Cannon*, for appellant.

Lovell & Davis, for respondent.

DUNBAR, J.—This is an action for damages for personal injuries. On March 17, 1909, respondent owned a well drill and appliances, and on that date and prior had been engaged in drilling a well in the town of, or near, Othello, Adams county, Washington, at a point close to a street about four hundred feet from the public school of that place, and on the usual and customary route of travel for school children attending that school, in going to and returning from the post office. This statement of the case is made by the appellant, and is criticized by the counsel for the respondent as not be-

[1]Reported in 109 Pac. 807.

ing a correct statement of the case, and it is insisted that the testimony does not show that the well drill outfit was on the usual and customary route of travel for school children coming to that school. But an examination of the record convinces us that the statement of the appellant is substantially correct, as shown by the testimony of Dewey Crabb on page 23 of the record, where he stated that, in going from the school to the post office, he would walk within ten feet of the well drilling outfit, that the other boys in going from the schoolhouse to the post office would walk within the same distance, and that they made a trip to the post office from the schoolhouse every day. It also appears that there was no other drill using explosives within half a mile of the place.

In making one of these trips on March 17, 1909, during the noon recess, and in returning from the post office, the appellant, Dewey Crabb, a boy ten years old, in company with three other boys, found four dynamite caps on the ground, about twenty-five feet from the drill. They put these caps in their pockets, took them to the schoolhouse and exploded two of them, whereby the appellant's hands were both very badly mangled. Some of the fingers were blown off and others were injured, and there was only one finger on each hand that was left without injury. The testimony of W. E. Wilkins, the respondent, on behalf of the appellant, was to the effect, that he kept these caps in a toolbox or chest; that the drilling machine was inclosed only for the purpose of protecting it from the weather. It does not appear from the testimony that it was inclosed so that an entrance to it was not available to any one passing by.

Upon the close of the plaintiff's testimony, motion was made by the defendant to instruct the jury to bring in a verdict for the defendant, for the reason that the proof offered by the plaintiff was insufficient; that it did not show a relationship between the master and the servant, nor did it show that the injury to the plaintiff was the direct effect of the negligence of a servant acting within the scope of his em-

ployment. An argument of considerable length was made before the court by both the attorney for the respondent and the attorney for the appellant, and the court, after taking he matter under advisement, finally reached the conclusion, that there was sufficient testimony to show the injury; that there was no showing of contributory negligence on the part of the plaintiff, but that the negligence in placing the caps where they were available to children was not brought home to defendant; and on that ground the motion was sustained.

There can be no question that the negligence of the servant in such a case as this must be imputed to the master, and we will not discuss that question further. In handling explosives the law imposes upon the operator a high degree of care, and especially so where children are involved. Unfortunate as the results prove, it is undoubtedly true that explosives of this character are exceedingly attractive to small boys, whether on account of the loud noise that follows the concussion, or from a commendable appreciation of the quick and effective results, we know not. But the fact remains that the attraction is so controlling that it must be taken into consideration by people who are using the dangerous explosives in a locality where children congregate; and in this case it is shown that the boys were in the habit of going by this well drill, and of stopping there and talking with the operatives. It is contended by the respondent that his testimony shows that he was not guilty of negligence, from the fact that he kept, as he stated, these fulminating caps in a tool chest, only taking out such numbers as he desired to use when he was preparing for an explosion. But under the rule announced by this court in *Olson v. Gill Home Inv. Co.*, 58 Wash. 151, 108 Pac. 140, this precaution was not sufficient. In addition, the witness also testified that he did not instruct the workmen in regard to the care of these explosives, where to keep them, or how to use them, because, as he states, they were men experienced in the work, and he presumed they knew their business, or words to that effect. He

also testified that these caps were used frequently when he was not present. So that the only real question there is in the case was the one upon which the court took the case from the jury.

But we think that the court erred in this respect, and that there was sufficient testimony to go to the jury on that proposition, and that while there was no direct testimony concerning the manner in which these caps found their way to the place where the boys obtained them, it was a reasonable and natural inference, which the jury would be warranted in drawing from the facts proven, that they came there as a result of the work which was going on in that place and in which they were used, and through the agency of the men who were operating the drill. In *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621, we held that, where the question arose as to whether the rock which killed Klepsch was thrown from the defendant's works or whether it came from another blasting operation which was in progress during the same period, was a question for the jury to determine. It was also held in that case that it was not a sufficient answer for the operator to show that he had given his employees strict general instructions to be careful, or that the employees were competent and usually careful men; while in this case, as we have seen, the respondent himself testified that no such instructions had been given to the employees as to their duty during his absence.

The judgment will be reversed, with instructions to try the cause.

CROW, PARKER, and MOUNT, JJ., concur.

RUDKIN, C. J. (dissenting)—I concur in the majority opinion in so far as it is based on the facts disclosed by the appellant's testimony, but if it should appear that the box containing the dynamite caps was kept by the respondent in his tool box in the shed enclosing the drilling machinery, and the caps were extracted therefrom by a trespasser or a thief, whether adult or minor, I am of opinion that respond-

ent is not liable for the consequential injuries, and in so far as the majority opinion holds or intimates to the contrary, I dissent.

[No. 8489. Department Two. July 9, 1910.]

ERMINA TAYLOR, *Respondent*, v. EDWARD E. TAYLOR, *Appellant*.[1]

DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. A decree of divorce sought on the ground of cruelty and personal indignities is warranted where it appears that the defendant manifested a violent temper against the plaintiff, frequently using profane language, that he stated to her and to neighbors that she was not wanted, and that he neglected her while she was sick in bed.

DIVORCE—ALIMONY—SUIT MONEY. Five hundred dollars alimony and $385 suit money is not an excessive allowance where the husband had several thousand dollars worth of property, and the trial occupied several days' time.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered May 14, 1909, upon findings in favor of the plaintiff, in an action for divorce, after a trial on the merits before the court. Affirmed.

Martin & Wilson, for appellant.

Sessions & Warren, for respondent.

PER CURIAM.—The plaintiff in this action seeks a divorce from the defendant upon the grounds of cruel treatment and personal indignities which by her complaint she alleges he has been guilty of towards her. The defendant, by his answer and cross-complaint, seeks a divorce from the plaintiff, alleging as grounds therefor that she has been guilty of cruel treatment and personal indignities towards him. A trial resulted in a decree of divorce in favor of the plaintiff, and awarding her the sum of $500 alimony and $385.45 attorney's fees and costs, and declaring the same a lien upon

[1]Reported in 109 Pac. 1019.

certain lands of the defendant. From this decree, the defendant has appealed to this court.

The only question argued by learned counsel for appellant is as to the sufficiency of the evidence to sustain the decree. A careful reading of all of the evidence shows serious conflict touching the acts of cruelty and personal indignities charged each against the other. The testimony of witnesses upon which the learned trial judge was compelled to decide the case was of such nature that he was in much better position to determine the facts than we are. We can see no useful purpose to be accomplished by reviewing the evidence here in detail. It was sufficient to show, if believed by the court, that appellant had a violent temper; that he repeatedly addressed the respondent in anger, using coarse and profane language; that he gave her to understand that he did not want her to remain in his home, saying, among other things, "Why don't you get out of here, no one ever wanted you here any way"; that he communicated his desire to get rid of her to his neighbors, who in turn communicated to her his remarks to that effect, and that he neglected her while she was sick in bed. It is true that there is some evidence tending to show that this treatment of her was not wholly unmitigated, but in view of all of the evidence, we are constrained to hold that it supports the conclusion of the learned trial court that she was entitled to a divorce.

It is also complained that the awarding of alimony and suit money was not justified. The record shows that appellant had land worth several thousand dollars, and that the trial of the cause occupied several days' time. In view of these facts we think that neither the amount of alimony or suit money was excessive. The judgment is affirmed.

[No. 8657. Department One. July 9, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. JESS LORENZY, *Appellant*.[1]

CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. The savings clause in the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing in this act shall apply to an offense committed before the day when this act shall take effect and that such offense shall be punished under existing laws as if this act had not been passed, is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect.

CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. Under the general savings clause in the act of 1901, which saved all proceedings "pending at the time of its enactment," and under the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing therein contained shall apply to an offense committed before it took effect but that such offense should be punished under the law existing when it was committed, it is not essential to a prosecution for such prior offense that it was pending when the penal code of 1909 took effect.

INDICTMENT AND INFORMATION—TIME FOR FILING—DELAY—WAIVER. After the information is filed, it is too late to move for the dismissal of a charge on the ground that no indictment or information was filed against the accused within thirty days after his incarceration, as required by Rem. & Bal. Code, § 2119, where accused passed the delay without complaint.

CRIMINAL LAW—NEW TRIAL—VERDICT—IMPEACHMENT. Under the statute making misconduct of the jury a specific ground for a new trial in a criminal case, the verdict may be impeached by affidavits of jurors where the misconduct does not "inhere" in the verdict, which means where it does not fall within or pertain to the legitimate issues in the case.

SAME. Where a juror, during deliberation, stated to other jurors, as of his own knowledge, facts material to the case tending to discredit the losing party as a witness, the misconduct does not inhere in the verdict and may be shown by affidavits.

SAME. In a prosecution for conniving at the prostitution of the wife of the accused, where the state was concluded by the testimony of the defendant that a certain house at B. was not a house of prostitution, it is misconduct, requiring a new trial, for a juror who lived at B., to state to other jurors during deliberation that if they would go to B. they would find the place to be "a house of prostitution yet" (FULLERTON, J., dissenting).

[1]Reported in 109 Pac. 1064.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 16, 1909, upon a trial and conviction of the crime of conniving at the prostitution of defendant's wife. Reversed.

M. P. Hurd, for appellant.

Augustus Brawley, for respondent.

CHADWICK, J.—Appellant was convicted of the crime of conniving at the prostitution of his wife. The charge is laid under chapter 123, Laws 1903 (Rem. & Bal. Code, §§ 2902, 2903), and the first point made is that, the original law being repealed by the new criminal code, the conviction cannot be sustained. This assignment is disposed of by the following cases: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *In re Newcomb*, 56 Wash. 395, 105 Pac. 1042; *State v. Hanover*, 55 Wash. 403, 104 Pac. 624, 107 Pac. 388.

However, appellant contends that the general savings clause passed by the legislature at its extraordinary session in 1901, to which reference is made in the *Hanover* case, is intended to apply only to proceedings "pending at the time of its enactment." It is true that the words quoted are used in the act, but when the whole act is considered in connection with section 42 of the criminal code (Rem. & Bal. Code, § 2294), there can be no doubt of the intention of the legislature to save the prosecution of all crimes under the law existing at the time of their commission. Under these statutes and the cases cited, it was not essential to the life of the charge that a proceeding was pending at the time of the enactment of the criminal code or at the time that it took effect.

The further point is made that, whereas defendant was arrested and incarcerated on July 2, 1909, and no information was filed within thirty days, nor until fifty-eight days thereafter, defendant should now be discharged under Rem. & Bal. Code, § 2119. It must be remembered that the jurisdiction of the superior court to try persons charged with crimes does not depend upon the statute, nor is jurisdiction

lost, except in case of a misdemeanor, where a dismissal results because of a failure to observe its provisions. An information was filed September 1, on which day defendant moved his dismissal. We think the motion came too late to even put the state to a showing. The object of the statute was to insure prompt advisement of the charge and a speedy trial. The statute is not so much directed to time, as to the nature of the charge and notice to the defendant. If a defendant is content to pass the delay until after the information is filed, he is in no position to complain, for the object of the law is attained. These observations are consistent with the previous holding of this court. *State v. Seright*, 48 Wash. 307, 93 Pac. 521.

While upon the stand as a witness in his own behalf, defendant was asked whether he had ever at any time connived at or consented to his wife being in a house of prostitution, and whether, if she ever did enter a house of prostitution for the purpose of living a life of prostitution, it was with his consent. He answered all such questions in the negative. On cross-examination defendant was asked a number of questions tending to show that his wife had been an inmate of houses of ill fame with his consent. Several places in Skagit county were enumerated. Among other things, he was asked about being at the place of Janis & Cheader at Baker, Washington. He described it as a restaurant and saloon, and said that his wife was stopping at the hotel which was "right where the saloon is and the restaurant." Appellant was a professional cook and was employed at the restaurant. There was nothing disclosed to indicate that the place was a house of prostitution, although the plain insinuation of the questions asked was that it might be so. The state was content to be concluded by the answer of the appellant. When the jury had retired, the character of the place became a subject of discussion, and one of the jurors who lived at Baker informed the other jurors that, if "they would go to Baker, they would find it to be a house of prostitution yet." It is not seriously

contended that the offending juror kept within the due bounds of his duty, but it is insisted that the wrong inheres in the verdict, and that cannot be impeached, under the authority of *State v. Aker*, 54 Wash. 342, 103 Pac. 420; *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 Pac. 28; *State v. Parker*, 25 Wash. 405, 65 Pac. 776, and *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131. In considering sections 2181, 2182, Rem. & Bal. Code, this court said in the *Parker* case that the court would entirely disregard those portions of affidavits filed in support of a motion for a new trial which tend to impeach the verdict of the jurors, and consider only those facts stated in relation to the misconduct of the juror, and which in no way inhere in the verdict itself. While the authorities divide upon the right to impeach the verdict by the affidavit of a juror, we think that the *Parker* case, in the light of our statute making misconduct of the jury a specific ground for a new trial in criminal cases to be shown by affidavit, is the true rule. If it were not so, the statute would have no meaning, and it might be impossible to impeach a verdict no matter how prejudicial the misconduct, for it is known that the deliberations of jurors are conducted in secret.

The only question open, therefore, is, Does the error inhere in the verdict? We think clearly that it does not. We have found no case or legal phrase defining the term "inhere." The common meaning of the term as defined in the dictionary is, "to be fixed or attached permanently to something." It would seem, then, that the natural way to express the definition of the word as here applied would be to say that it means lost in, or covered by, the verdict. Verdicts are rendered upon the evidence received in open court, and the true test would be whether the misconduct complained of fell within, or pertained to, the legitimate issues of the case, so that the verdict might have been influenced by it. It has been held that a verdict will not be set aside because of the knowledge of a defendant's character by a juror, since the jury must in some degree act upon its knowledge of the character of a

party. But we find no cases holding that a juror can make of himself an impeaching witness upon a question of fact which, so far as the record shows, is foreclosed against the state.

This case is to be distinguished from those rejecting a juror's affidavit that he has been influenced by his fellow jurors or as to his reasons for agreeing to the verdict, or that improper arguments were resorted to, or that the character of either litigant was discussed, as these matters inhere in the result and a showing thereof cannot be made by affidavit. All of these things depend upon the opinion of the juror as to the probable consequences of a case, and will always be rejected. But, on the contrary, proof of facts constituting actual misconduct will always be received. In the *Aker* case this distinction is sharply drawn. The court said:

"It is not claimed that the expression of opinion was based upon any fact outside the testimony which had been given upon the trial, or that the juror stated any facts relating to the accused, or that the expressions of opinion were made within the hearing of any person other than the jurors themselves."

In *Ralton v. Sherwood Logging Co.*, *supra*, the civil statute, Rem. & Bal. Code, § 399 was under consideration. After noting that it furnished a sole exception to the rule that a verdict could not be impeached by the affidavit of jurors, the court distinguished the case from the *Parker* case, saying:

"But in that case the conduct of the juror upon which the court awarded a new trial consisted of very damaging statements against the accused made to the jury, while deliberating, entirely outside of the evidence, touching his knowledge of the accused's being connected with other crimes thar the one involved in the trial, . . ."

That it is ground for a new trial that, after the jury has retired for deliberation, a juror has stated to the other jurors as of his own knowledge facts material to the case

or tending to discredit the losing party as a witness, is laid down in 29 Cyc. 810, and 12 Enc. Plead. & Prac. 585, where numerous authorities are cited to prove and sustain the rule. It is true that the juror says that he was without bias or prejudice, but as was said in the *Parker* case, that is not for the juror to determine. "It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the other jurors." The question must be decided by the court as a matter of law, and the rule is that, if it be reasonably probable that the juror's evidence influenced the verdict, it is such misconduct as will require a new trial. Being unable to say that the testimony of the juror did not influence the jury, we are bound to give the appellant the benefit of the doubt and order a new trial.

Other errors are assigned but are not discussed, and we find no merit in them.

The case will be reversed and remanded for a new trial.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

FULLERTON, J. (dissenting)—The jurors were on oath to try the issues between the state and the defendant according to the evidence. And since the record does not show that they disregarded their oath, since the record does not show that in making up their verdict they gave heed to the random remark of the juror of which complaint is made, the court should presume that they obeyed the oath, rather than presume that they disregarded it. Juries are composed of men of intelligence and understanding, and it is time that courts abandoned the folly of treating them as if composed of wayward children. The judgment should be affirmed.

[Nos. 8697-8699, 8702, 8705-8711. Department Two. July 11, 1910.]

In the Matter of the Applications of F. A. CHRISTENSEN *et al., for Licenses to Treat the Sick.*[1]

PHYSICIANS AND SURGEONS—LICENSE—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 8389, authorizing persons who desire to treat the sick to register their diplomas and receive a license on the payment of a fee, provided that they show evidence satisfactory to the examining board that they have been "legally" engaged in practice prior to the passage of the act, and are graduates of colleges or schools of prescribed qualifications, "or by having been in continuous practice in one locality in this state for the past two years," and § 8406, providing that licensees shall use only such titles as are designated in their diplomas, "or those having no diplomas" only such as are designated in their licenses, an applicant is entitled to a license upon a showing that he has been in continuous practice in one locality for the two years previous to the passage of the act, without any diploma, and although not "legally" engaged in practice as required by the then existing statute making practice without a license a misdemeanor.

Appeals from judgments of the superior court for King county, Holcomb, J., entered in October and December, 1909, reversing decisions of the board of medical examiners and directing licenses to applicants to practice medicine, upon trials *de novo* before the court without a jury. Affirmed.

Howard G. Cosgrove and *Higgins, Hall & Halverstadt*, for appellant, contended, among other things, that the only purpose of statutory construction is to determine the intent of the legislature and adjudge the effect thereof. *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216. A construction which will lead to mischievous and absurd results must be avoided. *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243. In construing statutes courts will, if possible, avoid a construction which will render an act unconstitutional. *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106. In construing statutes, the court will look to the old law, the

[1]Reported in 109 Pac. 1040.

mischief and the remedy. *State v. Stewart*, 52 Wash. 61, 100 Pac. 153. The purpose of a proviso is to restrain or qualify, not to enlarge what precedes it. Black, Interpretation of Laws, pages 271-273. A construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. *United States v. Moore*, 95 U. S. 760; *Pennoyer v. McConnaughy*, 140 U. S. 1; *Edwards' Lessee v. Darby*, 12 Wheat. 206; *United States v. State Bank of North Carolina*, 6 Pet. 29; *United States v. Macdaniel*, 7 Pet. 1. The purpose of this statute is protection to the health of the public. *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893; *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952; *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889. The construction contended for by the respondents would exempt this class of practitioners from the payment of a fee and render the law absurd and unconstitutional. *State v. Hinman*, 65 N. H. 103, 23 Am. St. 22; *State v. Pennoyer*, 65 N. H. 113, 5 L. R. A. 709; *Soon Hing v. Crowley*, 113 U. S. 703; *Yick Wo v. Hopkins*, 118 U. S. 356; *State v. U. S. & Canada Express Co.*, 60 N. H. 219; *McCulloch v. Maryland*, 4 Wheat. 316. No right can be founded on an illegal act, and practice by the daily commission of a misdemeanor by violating a law is not a "practicing" of medicine, etc. *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; *State v. Wilson*, 61 Kan. 791, 60 Pac. 1054; *Deaton v. Lawson*, 40 Wash. 486, 82 Pac. 879, 111 Am. St. 922, 2 L. R. A. (N. S.) 392; *Commonwealth v. Rice*, 93 Ky. 393, 20 S. W. 431; *State v. Taylor*, 140 Iowa 188, 118 N. W. 301; *State ex rel. Eberts v. Ohio State Medical Board*, 60 Ohio St. 21, 53 N. E. 298; *Dent v. West Virginia*, 129 U. S. 114; *State v. Davis*, 194 Mo. 485, 92 S. W. 484, 4 L. R. A. (N. S.) 1023.

J. P. Wall, Milo A. Root, John E. Humphries, George B. Cole, Joseph R. Anderson, J. B. Keener, Ray & Dennis, and *Stallcup & Keyes,* for respondents.

PARKER, J.—These cases involve the construction of chapter 192, Laws of 1909, p. 677 (Rem. & Bal. Code, § 8386 *et seq.*), relating to the practice of medicine and other systems or modes of treating the sick or afflicted. There are certain undisputed facts, alike in each case, which we regard as determinative of the right of each applicant to practice his or her mode of treatment. We will therefore dispose of all the cases in this one opinion.

Each of these applicants filed with the board of medical examiners created by this law an application for a license to practice, claiming the right to a license under the provisions of the law relating to the licensing of persons who were engaged in practice of their respective modes of treatment prior to the passage of the law. The board refused to issue license in each case, and thereupon each applicant appealed to the superior court, where his or her right to a license was tried *de novo* as the law provides. These trials resulted in findings and judgment in each case, reversing the decisions of the board of medical examiners and directing a license to be issued to each of the applicants accordingly. From these judgments, the board of medical examiners has appealed to this court.

The learned trial court found in substance, and it is not disputed here, that each of these applicants was for more than two years prior to March 18, 1909, the date of the approval of the law, a resident of this state, and had for the same period been in continuous practice in one locality in this state, of his or her respective mode of treatment. We will consider the question of the right of these several applicants to a license as if these facts constituted the only ground upon which they base their claims, other than the payment of the license fee, though some of the applicants base their claim upon facts which they insist show additional

qualifications entitling them to license. This law purports to cover the entire subject-matter of licensing practitioners of medicine and other modes of treating the sick or afflicted. It does not purport to amend any prior existing law, and expressly repeals all laws in any wise conflicting with its provisions. Its provisions, so far as necessary for us to notice them, are the following:

"Sec. 1. The governor shall appoint a board of medical examiners to be known as the board of medical examiners of the state of Washington, . . ." Rem. & Bal. Code, § 8386.

"Sec. 4. Any person who treats the sick or afflicted may register his or her diploma with the board of medical examiners, and receive a license to practice his or her respective mode of treatment, by paying a fee of ten dollars, which fee shall go towards defraying the expenses of said board: Provided, That he or she show evidence satisfactory to said board that he or she has been legally engaged in such practice prior to the passage of this act, in the state of Washington, and is a graduate of a legally incorporated school or college teaching the system or mode of treatment which the applicant intends or claims to follow, wherein the course comprises actual attendance and completion of two years of ten months each, or four terms of five months each, and the curriculum of study includes instruction in the following branches, to wit: Anatomy, physiology, chemistry and toxicology, bacteriology, gynecology and obstetrics, histology, hygiene, pathology and general diagnosis; or by having been in continuous practice in one locality in this state for the past two years; . . ." Rem. & Bal. Code, § 8389.

"Sec. 6. In order to procure a certificate to practice medicine and surgery, the applicant for such certificate must file with said board at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered medical school, the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the association of American medical colleges for that year, or satisfactory evidence of having possessed such diploma. . . ." [This section refers to those licensed upon examination.] Rem. & Bal. Code, § 8391.

"Sec. 20. All persons receiving a certificate or license

under this chapter shall use no deception in the use of titles of his or her mode of treating the sick, but shall use only such titles as are designated by his or her diploma; or those not having a diploma shall use only such title as he or she holds license to practice. . . . " Rem. & Bal. Code, § 8406.

It is contended in behalf of the board of medical examiners that an applicant must, in addition to showing two years practice in one locality, have a diploma and register the same with the board before he will be entitled to a license under the provisions of the last clause above quoted from section 4; while it is contended in behalf of the applicants who do not have and never had diplomas, that a diploma is not a prerequisite to their right to licenses under that clause. Learned counsel for the board of medical examiners insist that this clause is a part of the proviso, and invoke the general rule to the effect that the office of a proviso is to limit rather than enlarge the meaning of the section of which it is a part, and quote from Black on Interpretation of Laws, p. 273 as follows:

"The natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope."

This rule it is claimed results in limiting the meaning of the clause so that it has only the effect of prescribing an alternative qualification to that prescribed by the language immediately preceding it in the proviso. In other words, that it is only an alternative proviso appended to the first part of the section referring to the registering of a diploma. Conceding that this clause is in fact a part of the proviso, and looking to the provisions of section 4 unaided by other parts of the law, learned counsel's argument would seem to lead to the conclusion claimed; to wit; that a diploma is necessary in addition to the two years' practice in one locality, as it

seems to be necessary in addition to the prescribed qualifications following the word "provided" and preceding the two years' practice clause. But even confining ourselves to the provisions of section 4, this view is not entirely free from doubt. It will be noticed that the word "diploma," as used in the first part of the section, has there no defined meaning as to the kind of diploma required, or the kind, standard or grade of the school, society or institution issuing it. It is only when we notice the language immediately following the word "provided," and preceding the two years' practice clause in section 4, that the purpose of a diploma becomes evident. There we find it is evidently required for the purpose of showing graduation of the applicant from a school of a certain kind wherein certain branches of learning are taught. But when we come to the two years' practice clause with no requirement from the applicant to show evidence of his learning in any particular branch, it is not easy to see what the purpose is of having him furnish a diploma, especially when the first part of the section preceding the proviso, and the only part which could have any bearing upon the two years' practice clause, is utterly silent as to the nature of the diploma therein mentioned. We do not regard these observations as a conclusive answer to learned counsel's argument, but they suggest to our minds serious doubts as to the legislature having in mind the requiring of a diploma of any nature from those who had been in continuous practice in one locality in the state for two years.

Let us now notice some other provisions of the law. By section 20 it clearly appears that the legislature had in mind that at least some of those entitled to a license under this law should not be required to show their qualifications by diplomas, since it is there provided that the licensee "shall use only such titles as are designated by his or her diploma; or those not having a diploma shall use only such title as he or she shall hold license to practice." Learned counsel for the board of medical examiners contend that the words

"those not having a diploma" refer only to a licensee under section 6 upon examination, who is required to produce a diploma from a medical school of a certain standing "or satisfactory evidence of having possessed such diploma." We cannot agree with this contention. It seems to us that if a person ever had such a diploma and is basing his right to a license upon it, as he must under section 6, he will be governed in using his title as a practitioner by that which is designated in such diploma, whether he has physical possession of such diploma at that time or not. In other words, if he has or ever had a diploma and is granted a license upon it, then its designation of his title will govern whether it has any present physical existence or not. We think he is not one of those mentioned in section 20 as "not having a diploma." The only licensees mentioned in this law that these words could possibly refer to are those who are entitled to license by virtue of practice in one locality in the state for two years as provided in section 4. It is quite common in laws regulating professions and vocations and prescribing qualifications to be possessed by those entering upon them, to exempt those already engaged in them from showing any qualifications other than the fact that such persons are already so engaged or have been so engaged for a certain time. This seems to have been the policy pursued by our territorial and state legislatures. Code of 1881, § 2287; Laws of 1888, p. 87; Laws of 1890, p. 120; Laws of 1891, p. 372; Laws of 1901, p. 349 (Rem. & Bal. Code, § 7006); Laws of 1907, p. 228 (Rem. & Bal. Code, § 8426). And it has been held that such a provision is not such a discrimination as violates any constitutional right of those seeking to enter such professions or vocations. *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893; *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. 603; 30 Cyc. 1560.

It must be conceded that the provisions of this law are somewhat involved, and that the question of its meaning is not free from doubt. However, we are of the opinion that one

who has been in continuous practice in one locality in this state for two years prior to the enactment of this law is not required to furnish further evidence of his qualifications by a diploma, and that such a person would be entitled to a license regardless of the fact of his ever having a diploma.

In some of these cases it appears that the applicants were engaged in the practice of medicine and surgery for the two years prior to the passage of this law without having a license required by the law as then existing. Laws of 1901, p. 50. This, it is contended, excludes such a person from the right to a license; because it is argued, that such a person was not legally engaged in practice, and therefore was not engaged in practice at all within the meaning of the two years' practice clause of section 4. In support of this view our attention is called to the case of *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, where this court held that an amendment to the dentistry law providing, "This section shall not apply to persons engaged in the practice of dentistry at the time of the passage of this act who are *bona fide* citizens of the state of Washington," referred only to those who were previously *lawfully* so engaged under the same law. We do not think that decision is applicable here. We have noticed that the law here involved is a new and independent act, complete within itself, and repeals all former laws upon the subject. That part of section 4 following the word "provided" refers to two classes who may receive licenses. The first are persons who have been "*legally* engaged in such practice prior to the passage of this act." The second are those persons who have been in "continuous practice" in one locality for two years. It may be difficult to see a reason for the legislature exempting one class from the effect of their unlawful acts and not the other, but the use of the word "legally," in referring to one class and omitting it in referring to the other, clearly indicates the legislative intent to give the license privilege to the second class even though they have violated a previously existing law. The offense

was in any event purely statutory, merely a misdemeanor, did not involve moral turpitude, and there is nothing so extraordinary in granting the license privilege by the legislature to those engaged in practice for two years, even though such persons did thereby violate the then existing license law, as to suggest that we should attribute to the word "practice" as here used without qualification, any other than its ordinary meaning.

What we have said thus far disposes of the several cases upon the merits. Some technical questions of practice are raised which we think are without merit and are not such that we feel called upon to discuss them. We are of the opinion that the judgments of the learned trial court should be affirmed in each case. It is so ordered.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 8798. Department Two. July 11, 1910.]

In the Matter of the Application of I. S. HAROLD *for a License to Practice Medicine and Surgery.*[1]

PHYSICIANS AND SURGEONS—LICENSE — STATUTES — CONSTRUCTION. Rem. & Bal. Code, § 8389, requires that an applicant for a license to practice medicine based upon a diploma and prior practice in this state, as distinguished from one who had been "practicing" in one locality for two years, must have been "legally" engaged in such practice, and does not authorize a license to one who was practicing in this state without any license in violation of the then existing law.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered December 21, 1909, upon findings in favor of the defendants, sustaining a decision of the board of medical examiners denying an applicant a license to practice medicine and surgery, after a hearing before the court. Affirmed.

[1]Reported in 109 Pac. 1043.

Alexander & Bundy (*Joseph R. Anderson*, of counsel), for appellant.

Howard G. Cosgrove and *Higgins, Hall & Halverstadt*, for respondent State Board of Medical Examiners.

PARKER, J.—I. S. Harold applied to the board of medical examiners for a license to practice medicine and surgery, claiming to be entitled to such license under the provisions of chapter 192, Laws of 1909, page 677 (Rem. & Bal. Code, § 8386 *et seq.*), relating to the licensing of those engaged in practice at the time of the enactment of the law. The board refused to grant him a license, and he appealed to the superior court, where, as the law provides, his right to a license was tried *de novo*, resulting in findings and judgment affirming the decision of the board. From this judgment he has appealed.

The facts upon which appellant bases his right to a license are undisputed, and may be briefly stated as follows: He became a resident of the state of Washington, January 1, 1909, having been prior thereto a resident of the state of Indiana and engaged in the practice of medicine and surgery therein. Since then, and until after the enactment of this law, he was engaged in the practice of medicine and surgery in the state of Washington, without having a license so to do as provided by the then existing law. In addition to showing such practice in this state, he presented his diploma and evidence showing a graduation from a school having the curriculum of study specified in section 4 of the law. He did not offer to submit to an examination as to his qualifications to practice medicine and surgery under the provisions of the law relating to the licensing of those who are seeking to enter the profession, but relied wholly upon his alleged compliance with the provisions of the law relating to the licensing of those so engaged at the time of its enactment.

It is contended in behalf of appellant that by his showing of graduation from a school having the required curriculum of

study and his practice in this state prior to the enactment of the law, he has thereby complied with all of its requirements, relating to a certain class, entitling him to a license; while it is contended in behalf of the board of medical examiners that, since he was not *legally* engaged in the practice in this state prior to the enactment of the law, he is not entitled to a license, except he prove his qualifications as required by other provisions of the law. Section 4 of the law reads:

"Sec. 4. Any person who treats the sick or afflicted may register his or her diploma with the board of medical examiners, and receive a license to practice his or her respective mode of treatment, by paying a fee of ten dollars, which fee shall go towards defraying the expenses of said board: *Provided, That he or she show evidence satisfactory to said board that he or she has been legally engaged in such practice prior to the passage of this act, in the state of Washington,* and is a graduate of a legally incorporated school or college teaching the system or mode of treatment which the applicant intends or claims to follow, wherein the course comprises actual attendance and completion of two years of ten months each, or four terms of five months each, and the curriculum of study includes instruction in the following branches, to wit: Anatomy, physiology, chemistry and toxicology, bacteriology, gynecology and obstetrics, histology, hygiene, pathology and general diagnosis; or by having been in continuous practice in one locality in this state for the past two years; and all such persons shall be granted thirty days after the organization of said board to make such application and furnish such evidence, after which time all persons desiring to treat the sick shall first take the examination as provided by this law." Rem. & Bal. Code, § 8389.

The controversy is reduced to the question, Has appellant satisfied the requirement of that part of the law above quoted in italics? It is manifest that at the time he was engaged in the practice of medicine and surgery in this state, from January 1, 1909, until the time of the enactment of this law, without having a license so to do, he was violating the plain provisions of the then existing law regulating the licensing of physicians and surgeons. Bal. Code, § 3019; Laws of

1901, p. 50. This being true, it needs no argument to demonstrate that he was not "*legally engaged in such practice prior to the passage of this act.*" We find nothing in the law warranting us giving to the word "legally" any other than its ordinary meaning. In our decision just rendered, *In re Christensen, ante* p. 314, 109 Pac. 1040, we recognized that the legislature acted advisedly in using the word "legally" in this clause and omitting it from the two years' practice clause. We conclude that, within the meaning of the law, appellant was not engaged in such practice prior to the enactment of the law as will aid him in procuring a license thereunder.

The judgment is affirmed.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 8756. Department One. July 13, 1910.]

G. W. GRAAF, *Appellant*, v. VULCAN IRON WORKS, *Respondent*.[1]

MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES—QUESTION FOR JURY. Negligence of the master may be inferred from an accident on the principle of *res ipsa loquitur* and is a question for the jury, where the right-hand wheel of a truck dropped off, injuring a machinist who was assisting in pushing the truck bearing an iron column weighing 1,600 pounds, a number of such trucks having been used in the shop for such purposes indiscriminately for twelve years whenever needed by any of the employees, and the injured servant owing no duty to inspect or keep the same in repair.

SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. A machinist does not assume the risk, and is not guilty of contributory negligence, in using a truck for wheeling a heavy iron casting, the wheel of which dropped off, where there were several such trucks in the shop, used indiscriminately for that purpose whenever needed by any of the employees, who took the one most convenient, and where he owed no duty to inspect or keep them in repair.

[1]Reported in 109 Pac. 1016.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 18, 1910, upon motion of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged as a machinist. Reversed.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for appellant.

Farrell, Kane & Stratton, for respondent.

Gose, J.—The plaintiff brought this action to recover damages for personal injuries sustained while employed by the defendant. There was a verdict in his favor. Thereafter, upon the motion of the defendant, a judgment of dismissal was entered. The plaintiff has appealed.

The case was submitted to the jury upon the evidence introduced by the appellant, the respondent offering no testimony. The facts are few and simple. The record discloses that the appellant, at the time of the injury, had been employed by the respondent in its machine works as a machinist for twelve years; that his main work was to operate a planer, by means of which heavy iron was turned and shaped for final assembly into machinery of different kinds; that when the planer work was finished, the iron was loaded upon a truck by means of a traveling crane, and then moved by the machinist to another part of the shop; that there were five or six of these trucks in use; that they were ten or twelve feet in length, about twenty inches in height, and were designed to, and did, carry heavy loads of material; that the frame of the trucks was wood, set upon round iron axles, resting upon two iron wheels held in place by a split pin, the axle revolving with the wheel; that at the time of the accident, the appellant, with an assistant, was wheeling one of the trucks, loaded with a cast iron column sixteen feet in length and weighing about 1,600 pounds; that the appellant was at one end of the casting "steering and shoving;" that the right wheel dropped

off, causing the column to strike the wall, severing the appellant's thumb.

The evidence further shows, that the same or similar trucks had been in use in the respondent's shops for twelve years or more; that the appellant used them as occasion required; that at times he would use one several times a day, and at other times a week would elapse without his using them; that in using them he selected the one that was most convenient, and that they were used indiscriminately by the employees of the shop for wheeling material about the shop, or for whatever purpose "the help, employees, or foreman, or others wanted to use them for;" that the appellant had not been instructed to inspect the trucks, or see that they were kept in repair; that he did not inspect them; that he did not know whether the pin came out or what caused the wheel to come off, and that he did not know that the axle revolved, until after he had received the injury.

We think the record presents a state of facts which, unexplained, warranted the jury in inferring the negligence of the respondent. There was no duty of inspection cast upon the appellant, either expressly or by implication; nor was the truck in his exclusive use or control. Its use was a mere incident to his main employment as a machinist. It is fundamental that it is the duty of the master to furnish the servant reasonably safe instrumentalities with which to carry on his work, and to maintain them in a reasonably safe condition. Common observation and experience teach that sound appliances do not break when employed in a proper manner and in the use for which they were designed. If they break when so used, it is a circumstance from which it may be inferred either that they were defective in the beginning, or had become so by use. The evidence warrants the conclusion that the truck was not overloaded, and that it was being used in the ordinary way for the work for which the master had furnished it.

There is no evidence of any negligence upon the part of the

appellant. He assumed only the risks that were open and apparent. He did not assume the risk of the failure of the master to keep the trucks in repair, when the want of repair was not open or apparent. He testified that he was not instructed to inspect or repair the trucks. The respondent had five or six trucks, used, and intended by it to be used, by any of its employees who might need them. No one truck was alloted to the appellant. When he had occasion to use one, he took the nearest one that was not in use. To hold that the duty to inspect was cast upon him by implication, would be to say that it was the duty of each employee to inspect each truck every time he used it, when it is apparent that, if this duty were imposed upon all the employees, the same trucks would probably be inspected by a half dozen different men on the same day. It is apparent that the respondent did not intend such a waste of time and energy. The doctrine of *res ipsa loquitur* means that the jury, from their experience and observation as men, are warranted in finding that an accident of this kind does not ordinarily happen except in consequence of negligence. As was said in *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 19 N. E. 166, 12 Am. St. 526, 1 L. R. A. 698:

"All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause."

The jury was warranted upon the facts in finding that the appellant had exonerated himself from the imputation of negligence, and that the injury would not have happened but for the negligence of the respondent. This view is supported by the decisions of both this and other courts. *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *Id.*, 51 Wash. 81, 97 Pac. 1104; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888; *Sullivan v. Rowe*, 194 Mass. 500, 80 N. E. 459; *Graham v. Badger*,

164 Mass. 42, 41 N. E. 61; *Barnowsky v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33.

The respondent urges that the accident "might have been due to causes for which the servant was responsible, or those for which the master was responsible, or those for which neither was responsible, because it may not have been due to negligence at all." The answer to this contention is that the jury has, upon the evidence submitted, weighed the probabilities, exonerated the servant, and found the master guilty of negligence. As we have seen, the respondent offered no testimony. Surely it cannot be said that reasonable minds may not differ as to whether the appellant was negligent.

The judgment is reversed, with directions to enter a judgment upon the verdict.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

[No. 8608. Department One. July 13, 1910.]

WILLIAM L. DIMMICK *et al.*, *Appellants*, v. D. S. SPRINKEL *et al.*, *Respondents*.[1]

PRINCIPAL AND AGENT—POWERS—EXCEEDING AUTHORITY — RIGHTS OF THIRD PERSONS. An objection that a mortgage executed by an attorney in fact is void because the power of attorney only authorized conveyance by quitclaim, can be asserted against the mortgagee only by the principal.

ESTOPPEL—PRINCIPAL AND AGENT—POWERS. Where an attorney in fact, with power only to sell, mortgaged the property to borrow money for the purchase price, and then conveyed the land to his wife, he and those claiming under him are estopped to assert that the mortgage was invalid because not authorized by the power of attorney.

Appeal from a judgment of the superior court for Benton county, Canfield, J., entered July 19, 1909, upon findings in favor of the defendants, dismissing an action for the strict

[1]Reported in 109 Pac. 1018.

foreclosure of a mortgage, after a trial on the merits before the court without a jury. Reversed.

Frank A. Luse, for appellants.

H. Dustin, for respondents.

CHADWICK, J.—One Henry J. Thomas, acting under a power of attorney executed by the Santa Fe Pacific Railroad Company, made a mortgage in the name of the railroad company upon certain lands in Benton county, the record title of which was in the railroad company, to William L. Dimmick, the plaintiff herein. When called as a witness in this case, Thomas testified that the money loaned, $935, was used by him to pay the purchase price of the land. Thereafter, and still acting under his power of attorney and in the name of the company, Thomas conveyed the land to his wife, Hattie J. Thomas. Thereafter several mortgages were executed by Thomas and his wife, and a judgment was obtained by the defendant D. S. Sprinkel. On January 3, 1908, Thomas and wife deeded the property to the plaintiffs, who began an action against defendants to compel a redemption, or, as denominated by plaintiffs' attorney, a strict foreclosure. The trial court found that the mortgage made in the name of the railroad company by Thomas, its attorney in fact, was null and void, and dismissed the action. Plaintiffs have appealed.

It was the theory of the court below that, inasmuch as the power of attorney was limited in its terms to a power "in its place and stead to convey by quitclaim deed the said lieu lands so selected as aforesaid, in whole or in part, and the said Santa Fe Pacific Railroad Company to any grantee in any conveyance executed by said attorney hereby gives notice that said attorney hereunder has authority to convey in whole or in part only the lands," etc., the attorney in fact had no power, so long as the legal title remained in the railroad company, to execute any conveyance other than might fall within the strict definition of the terms of his power; and

there being no proof of the power of the attorney to make the mortgage, there was an entire failure of proof to establish any right whatever in the plaintiffs under the mortgage.

That an attorney in fact with power to sell has no power to mortgage, and that one who takes by or through a conveyance executed by an attorney in fact must take notice of his power, is well settled and needs no citation of authority. But this rule is for the benefit of the principal, and we know of no cases, and none are cited, holding that, where the principal is not present and objecting, a third party, as in this case an involuntary lienholder, can set up the invalidity of an instrument executed in excess of the power. As between the appellants, the mortgagees, and Thomas, no such question could arise, for Thomas would be estopped to set up his own wrong or the invalidity of the mortgage to defeat the obligation which inured to his benefit. This being so, it follows that the one claiming by, through, or under him, or his grantee, would be bound by the acts of the agent, and likewise estopped to plead the invalidity of the mortgage. It cannot be denied that Thomas might, as attorney for the railroad company, have deeded the property to his wife, and then joined with her in executing the mortgage to secure the money borrowed to pay the purchase price. It would follow then, that, as between the parties, their privies, and subsequent lienholders, the validity of the mortgage could not be put in issue. Although possibly permissible under some circumstances, we are unwilling to hold that any necessity for a strict foreclosure of the mortgage exists in this case, and in the event of a final decree in favor of plaintiffs, we direct that the usual practice be pursued, and the property be sold to satisfy the debt subject to redemption.

Judgment reversed, and the cause remanded for a new trial.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8651. Department One. July 13, 1910.]

A. H. AVERY *et al.*, *Appellants*, v. LORITZ JOHNSON *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES—APPROPRIATION—INDIAN RESERVATIONS—SETTLEMENT. No right to appropriate the waters of a creek for irrigation within an Indian reservation could antedate the opening of the reservation to settlement, nor could it antedate actual *bona fide* settlement upon contiguous lands capable of being irrigated thereby.

SAME—BONA FIDE SETTLEMENT. A speculating squatter on relinquished government land, who made no entry on his own behalf during two years, is not a *bona fide* settler and is not entitled to appropriate waters for irrigation.

SAME—PRIORITY. Where the first appropriator of water on public land has perfected his title, and proceeded with reasonable diligence in extending his cultivated area, he is entitled to the quantity of water needed to irrigate his land to the exclusion of subsequent appropriators or riparian owners.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered November 15, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the use of the waters of a creek for irrigation purposes. Reversed.

Alvin W. Barry, for appellants.

E. Fitzgerald, for respondents.

CHADWICK, J.—The south half of the Colville Indian reservation was opened to settlement on October 10, 1900. At that time one Georgie A. Warren made homestead entry of a certain one hundred and sixty-acre tract of land riparian to Antoine creek, a small stream flowing from the northeast into the Okanogan river. At about the same time, C. C. Kloppenstein made homestead entry of a one hundred and

[1]Reported in 109 Pac. 1028.

sixty-acre tract lying east of the Warren entry. The lands in their natural state were semi-arid and incapable of producing crops without irrigation, but with irrigation the lands were capable of producing fruit, hay, and like products in great abundance. The plaintiffs Fruit succeeded to the rights of Warren, and plaintiff Avery to the rights of Kloppenstein. Both of the original entrymen and their successors, these plaintiffs, began and have continued with reasonable diligence to irrigate their lands, and they have from year to year increased the cultivated and irrigated area, so that there are now on the Warren entry about one hundred and fifteen acres in cultivation, and on the Kloppenstein tract about fifty-four acres, put to profitable uses by irrigation from the waters of Antoine creek. The full flow of the creek does not exceed three and one-half cubic feet per second from June to September, and in the extreme dry season does not exceed two and one-half feet, and it is shown, we think, by the testimony of both sides, that this is not more than enough to successfully irrigate the lands of the plaintiffs. In 1901 George Rice made homestead entry of one hundred and sixty acres above the Kloppenstein lands. He cleaned out an old irrigation ditch, which had been used by some squatter or squaw man prior to the time the reservation was opened, but did not put the water to any beneficial use. In 1902 Rice relinquished to one Crosby. Crosby never made any entry of the lands, being content, so far as the record shows, to remain a squatter until he could dispose of his "right," which he did in the fall of 1904 to the defendants, who made settlement in November of that year, and have since complied with the homestead laws and now own the land. The testimony differs as to the amount of land irrigated by defendants. They say about twenty acres in 1905, and increasing until at the present time the irrigated tract runs from thirty-five to forty acres; while the plaintiffs' evidence would indicate that the present irrigated area does not exceed twenty-three acres, including seven or eight acres on some "scrip" land lying fur-

ther up the creek. The court made a decree, dividing the use of the waters of the creek between all the parties, and plaintiffs have appealed.

The court found, and we think properly, that no right of appropriation in any of the parties could antedate the opening of the reservation to settlement; and for the same reasons it would follow that no right could antedate an actual *bona fide* settlement upon contiguous lands, capable of being irrigated by the waters of the stream. Hence, no rights would attach to respondents' land by reason of the fact that a squatter or squaw man took out ditches some years before the reservation was opened, and none could attach by reason of Rice's homestead entry, or, if they did, they were lost by Crosby who, although he put in a small garden, had no right or title, present or prospective, to the land. If a party seeks to claim water for irrigating agricultural land by appropriation, he must own the land sought to be irrigated, or be an actual *bona fide* settler having a possessory interest. There must be evidence of an intent to acquire title. The right of a squatter or speculator to claim the right of appropriation has not been recognized by custom, or sanctioned by statute. That Crosby did not sustain any *bona fide* relation to the land is sufficiently evidenced by the fact that, although the land was surveyed and open to entry, he carried Rice's relinquishment to the government for nearly two years without filing it or making any entry on his own behalf. A mere squatter can claim no right, either as an appropriator or a riparian proprietor. *Kendall v. Joyce*, 48 Wash. 489, 93 Pac. 1091; Kinney, Water & Water Rights, § 286; *Alta Land & Water Co. v. Hancock*, 85 Cal. 219, 24 Pac. 645, 20 Am. St. 217; *Smith v. Logan*, 18 Nev. 149, 1 Pac. 678. It follows that respondents' title to the waters of Antoine creek must date from the time of their entry in 1904, at which time they were subject to the prior appropriation of the appellants who, as the evidence shows, will probably need the entire flow in the dry season of the year.

The case falls squarely within the rule of *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308, rather than *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107; and *Nesalhous v. Walker*, 45 Wash. 621, 88 Pac. 1032, as is contended by respondents. The latter cases define the rights of parties riparian to a stream to use water for irrigation as an incident to their riparian right, and do not apply unless the rights of all parties are equal and dependent upon riparian right. In the case at bar, the waters of Antoine creek were appropriated and being used at the time respondents settled and filed on their land, and were not subject to a riparian right to use the waters for irrigation, as against the first appropriator who has perfected his title and was with reasonable diligence extending the area of cultivation on his lands riparian to the stream.

"It is an elementary principle of the law of appropriation of water for irrigation that the first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants by appropriation or riparian ownership." *Longmire v. Smith, supra.*

It is unfortunate that the flood waters of Antoine creek cannot be conserved for the use of all, but, so long as our laws measure the rights of the appropriator of water by the necessities of the dry season, the first in time must be held to be the first in right. The just purpose of the trial judge to apportion the waters cannot be sustained in the light of the evidence showing that there is no excess of water running to, or wasted by, the appellants.

This cause is remanded with instructions to enter a decree fixing the amount of water actually necessary to irrigate the lands of appellants, even to the full flow of the stream in the dry season; leaving the residue, if any, subject to the riparian right of respondents.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8588. Department One. July 14, 1910.]

BOWLES COMPANY, *Respondent*, v. CHARLES CLARK *et al.*, *Appellants*, J. A. FRASER, *Defendant*.[1]

BILLS AND NOTES—CHECK BY STRANGER—RIGHTS OF PAYEE—DUTY TO ACCOUNT. The payee of a check drawn by a stranger to him is not a purchaser of the check nor a holder in due course, and if he receives it he is bound to account to the drawer upon demand.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—DUTY OF THIRD PERSONS—DILIGENCE—MECHANICS' LIENS. Where a company dealing in plumbing supplies had refused an irresponsible contractor credit, and the contractor brought it a check from the owner of a house in course of construction, payable to the dealer, the dealer must use reasonable diligence to ascertain whether the contractor owed the check or was delivering it as agent; and where the contractor, instead of using it to purchase supplies as directed by the drawer of the check, paid off an old account, took the balance in cash, and secured further credit for the supplies needed, the dealer cannot claim a mechanics' lien against the house for the supplies furnished, intended by the owner to be paid for by the check.

Appeal from a judgment of the superior court for King county, Main, J., entered September 22, 1909, in favor of the plaintiff upon an agreed statement of facts, in an action to foreclose a materialman's lien. Reversed.

Chauncey L. Baxter and *John R. Wilson*, for appellants.
McClure & McClure, for respondent.

FULLERTON, J.—The appellants Clark are the owners of certain real property in the city of Seattle on which they constructed a dwelling. At the time the house was in the process of construction, defendant Fraser was the manager of the Enterprise Plumbing Company, and as such manager contracted with the Clarks to furnish the necessary materials and to do certain plumbing required by the plans of the house. After he had partially performed his contract he informed the appellants that the balance of the material to complete the

[1]Reported in 109 Pac. 812.

work would cost between $65 and $70, and that he did not have such materials and could not obtain them on credit, but that they could be procured from the respondent. The appellant Charles Clark thereupon made out a check for the sum of $70, payable to the respondent, and delivered it to Fraser with the request that he get the necessary materials from the respondent and deliver the check to it in payment. Fraser took the check and delivered it to the respondent as directed, but requested it at the time he did so to credit $36.71 thereof to a certain account which he had theretofore purchased for the Clark dwelling and for which he had not paid, to credit $18.29 thereof to his general account, and to pay him the balance of $15 in cash. The respondent cashed the check and made disposition of the money as thus requested. Later on, Fraser obtained from the respondent plumbing supplies of the value of $68.74, which were delivered at the house of the appellants and actually used by Fraser in completing his plumbing contract with them. During all this time the appellants and the respondent were strangers, having had no direct dealings with each other of any kind whatsoever. Within the statutory time for filing a materialman's lien, the respondent, claiming that the materials last delivered had not been paid for, filed a lien on the appellants' dwelling house, and thereafter brought the present action to foreclose the same. On the trial the trial judge entered a decree foreclosing the lien. This appeal was taken therefrom.

The record does not disclose the ground upon which the trial judge rested his decision, and we are not otherwise advised as to the reasons he deemed controlling. The respondent's learned counsel, however, argue upon the theory that the check was a negotiable instrument coming into the respondent's hands for value and in due course, and that it, as a *bona fide* holder thereof, was in no manner liable to account to the appellants therefor. On this question they say in the brief:

"The check came into plaintiff's hands in due course of business for a valuable consideration and without notice of any irregularity whatever. It was deposited in the bank, the amount thereof collected and passed to plaintiff's credit. Let us suppose that the additional supplies for which lien is claimed had not been furnished. In that event would Mr. Clark be in a position to sue plaintiff and recover $33.29, the amount now in dispute? Manifestly he could recover nothing, for the check having come into plaintiff's hands for a valuable consideration, without notice of any irregularity whatsoever, became plaintiff's property and plaintiff's rights thereunder could have been enforced by suit, if necessary. . .

"This check was not received by plaintiff as a loan; it was not received by plaintiff to be held for Mr. Clark's benefit. Plaintiff is not in the banking business and is entitled to have its wishes consulted before receiving money from its customers for goods to be purchased later and for which money it must account. So far as plaintiff was informed and so far as the record in the case goes, plaintiff at the time it accepted this check had no intimation that it would be called upon to furnish additional materials for the dwelling. When the check was presented to the plaintiff, disposition of the proceeds was made exactly as was requested by Mr. Clark's agent, Mr. Fraser. Mr. Clark's account was entirely extinguished and full value was given for the amount represented by the check. This was as far as plaintiff was obliged to go."

The question presented by the record is indeed somewhat novel, but it has seemed to us that it cannot be solved by reference to the laws relating to negotiable instruments. The respondent was in no sense a purchaser of the check, nor was it a holder thereof in due course, as that phrase is defined in commercial law; it was the payee named in the check, and its obligations to the drawer of the check were like those of payees in checks generally, it was obligated to account to the drawer for the check or for its proceeds. The general rule in this respect was not changed by the fact that the respondent was a stranger to the drawer and did not know the purposes for which the check was forwarded to it. If it did not care to assume the responsibility of accounting, it should

have refused to receive it. By doing this it could have relieved itself of any liability whatsoever, but when it accepted the check, even though it did not know the purposes for which it was drawn, it obligated itself to account therefor. It owed no voluntary duty of accounting, perhaps, but certainly a duty to account when called upon by the drawer. To so hold, is not, as the respondent's counsel seem to argue, making the respondent the drawer's debtor against its will. On the contrary, the respondent assumed that relation voluntarily. It accepted the check instead of refusing it, and it was this act that gives rise to its liability.

Having a duty then to account for the check, the question remains, did it so account when it appropriated it to Fraser's use. It seems to us that it did not. It is true that Fraser was the appellants' agent for a special purpose, and it is true also that the respondent, since it was not informed of the special limitations upon his powers, had the right to assume that his powers were such as the circumstances surrounding the transaction made them appear to be. But we think it too much to say that these circumstances were of such a nature as to warrant the belief that the property in the check was the property of Fraser. The check itself contained a distinct warning to the contrary. It was made payable to the respondent, a stranger to the drawer, and not to Fraser, and it is not reasonable to suppose that Fraser would have accepted payment of an obligation due himself in a form which he could not use without the consent and co-operation of a third person. Fraser, moreover, as the respondent well knew, was without credit with the respondent, or elsewhere, and the fact that a person is not to be trusted financially is some evidence at least that his purported statements of fact are not to be believed when they run contrary to ordinary business dealings. A person dealing with an agent must not act negligently, but must use reasonable diligence to ascertain whether the agent acts within the scope of his powers. He is not authorized under any circumstances to blindly trust the

agent's statements as to the extent of his powers, much less can he do so when he knows that the agent is untrustworthy, and the very circumstances under which the statements are made bear witness to their untruth. Here the circumstances were such as to show clearly, we think, that the acts and representation of the agent were beyond the scope of his apparent authority.

The case is not altered by the fact that the respondent had sold Fraser certain supplies which had been used in the construction of the appellants' building. The appellants did not know this fact, and the respondent had no reason to believe that the appellants knew it. In determining whether an agent acts within the apparent scope of his authority, the acts of the principal alone are to be considered. The principal is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused by the agent. 2 Enc. L. & P. 960.

The judgment appealed from is reversed, and the cause remanded with instructions to enter a judgment in favor of the appellants to the effect that the respondent take nothing by its action, and that the appellants recover their costs.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8451. Department Two. July 16, 1910.]

W. C. LaBee, *Respondent*, v. Sultan Logging Company, *Appellant*.[1]

Continuance—Absence of Witness—Diligence. A continuance is properly denied to defendant to secure the attendance of a witness in its employ in British Columbia and under its control, where his evidence had been given on a former trial, issues on amended pleadings had been made up for two months, and no excuse was shown for failing to take his deposition, nor due diligence exercised to secure his attendance.

Master and Servant—Negligence—Defective Appliances—Evidence—Question for Jury. The negligence of a master in furnishing a defective wire rope to support a gin pole is for the jury, where there was evidence which, though contradicted, tended to show that the rope broke at a splice, which should be stronger than at any other place if properly spliced, that the defendant was attempting to move a heavier load than usual, and applied the power before plaintiff had released a brake; since there was direct evidence of the breaking of an appliance through defendant's negligence, and evidence eliminating negligence by the plaintiff and his fellow servants.

Appeal—Review—Harmless Error—Instructions. Where there was no evidence warranting the submission to the jury of the issue of assumption of risks, error in instructions thereon are not prejudicial to the defendant.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 3, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through the breaking of a cable. Affirmed.

Graves & Murphy, for appellant.
Roney & Loveless and *Hathaway & Alston*, for respondent.

Crow, J.—This action, which was commenced by W. C. LaBee against Sultan Logging Company, a corporation, to recover damages for personal injuries, has heretofore been

[1]Reported in 109 Pac. 1023.

in this court on a former appeal (47 Wash. 57, 91 Pac. 560, 20 L. R. A. N. S., 405), and on rehearing (51 Wash. 81, 97 Pac. 1104). From a judgment in plaintiff's favor entered upon a second trial, the defendant has appealed.

The appellant first contends that the trial court erred in denying a continuance which it asked to secure the attendance and evidence of one Guy Bower. It appears that Bower, then appellant's foreman, was present at the time and place of the accident; that in December, 1908, this cause was noted for setting for trial; that on February 27, 1909, it was set down for trial on March 22, 1909; that during the winter of 1908-9 Bower was in British Columbia, employed by stockholders of appellant; that he was subject to appellant's control, and that appellant had not taken his deposition, as it wished and expected his attendance at the trial. Appellant contended that, by reason of the season of the year, the weather conditions, imperfect means of transportation, and lack of time, it could not reach Bower after the setting of the cause and prior to the trial. It theretofore had time to take his deposition, but neglected to do so. This was the second trial. The issues had been completed upon a second amended complaint, for more than two months. The respondent had introduced his evidence on the former trial. The appellant was advised of his evidence and the issues. No sufficient excuse has been shown for appellant's failure to take Bower's deposition, nor does it appear that it exercised due diligence to secure his attendance. The trial judge committed no error in refusing the continuance.

After the former appeal, the respondent filed a second amended complaint, in which he pleaded appellant's negligence as follows:

"That the plaintiff's work as second or assistant loader consisted in helping to load logs on empty cars and in assisting in removing a loaded car from its position under the 'gin pole' to be replaced by an unloaded car; that on the 24th day of May, 1906, at the time of the accident complained of,

the defendant had several loaded cars and one unloaded car coupled together in a train, the car last loaded being yet in its position under the said 'gin pole' and, to move the said train in order to bring said unloaded car into position under the 'gin pole' for the purpose of loading it, the loose end of the wire rope, attached to the donkey engine and passing over said pulley at the upper end of said 'gin pole,' was attached by the defendant, according to its custom, to the end of the unloaded car farthest from the loaded cars; that the defendant in order to unset or loosen the brakes of its cars had provided a piece of gas pipe about three feet long; that the plaintiff on said day of May, 1906, while in the discharge of his duties and in obedience to the expressed orders of the defendant, after securing said piece of gas pipe provided by defendant for loosening brakes, mounted the said unloaded car, unset or loosened the brakes of the same and stepped forward on the end of the car last loaded with logs for the purpose of unsetting or loosening its brakes; that as plaintiff was preparing to insert the said piece of gas pipe into the wheel in order to unset or loosen the brakes of said last loaded car, the defendant by its foreman Gus Bowers gave orders to the engineer, without plaintiff's knowledge, to turn on the power of the engine and move the said train in order to bring the said unloaded car into position under the said 'gin pole;' that while plaintiff was in the act of inserting the piece of said gas pipe into the wheel of said brake to unset or loosen it, he noticed the farthest end of the said unloaded car heave up; that plaintiff, taking warning, immediately attempted to jump from his position on the end of the said car last loaded when one of the three wire ropes, improperly, carelessly, and negligently fastened by the defendant to the upper end of the 'gin pole' for the purpose of securely holding the 'gin pole' in its inclined and leaning position over the railroad or switch track, and negligently and defectively spliced into the ring that was thrown over and around said 'gin pole' and negligently, carelessly, wantonly and knowingly allowed by defendant to become old, worn, weakened and rusted and in much need of repairs or displacement by a new rope, broke and the whole weight of the said 'gin pole' came down on the plaintiff."

Appellant now insists that the respondent failed to introduce evidence to show negligence on its part, other than in

giving the signal while the brake was set on the loaded car and before it had been released, and contends that the trial court erred in refusing to withdraw from the jury all questions of negligence except that relative to giving the signal. In other words, appellant now insists that the evidence was insufficient to show negligence on its part in failing to provide suitable and safe appliances. Respondent's evidence and that of his witnesses was sufficient to show that he was using appliances provided by appellant in the manner intended and as directed by appellant; that the guy rope broke in a splice made by the appellant; that a rope properly spliced would ordinarily be stronger in the splice than at any other point; that the rope had theretofore been used as a yarding line; that many of its strands had been worn and broken; that each strand came to the surface at some point, which fact the respondent contended would have a tendency to weaken the entire line, the strands being worn and broken on the surface; that at the time of the accident the appellant was endeavoring to move a heavier load than it had moved theretofore; that it was attempting to pull four loaded cars and one empty car up grade; that the order was given for the engineer to apply the power before respondent had released a brake on a loaded car, and that the guy rope broke, causing the accident. In our former opinion less evidence was held sufficient to make a *prima facie* case of negligence against the master. On the rehearing, *LaBee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104, we said:

"The injury itself proves nothing; it may have been the fault of the servant. But in a case where the servant eliminates any fault on his part by showing that the injury was caused by the giving way of an instrumentality furnished him with which to work, while he was using it for the purposes intended, and in the manner directed, he shows that the fault is in the instrumentality itself for which the master is *prima facie* responsible. The case differs from an ordinary case of injury only in the manner of proof. In each case, of course, a *prima facie* case of negligence against the master must be made out, but in the one it is made out by showing the in-

jury, and eliminating negligence on the part of the servant and his fellow servants, while in the other it is made out by direct evidence of negligence on the part of the master."

Respondent not only showed the use of the appliance by him as directed by appellant, and its breaking, but also introduced evidence eliminating negligence on his part and that of his fellow servants. While it is true that conflicting and contradictory evidence was introduced by appellant, the question as to whether it was sufficient to rebut and overcome the proof produced by respondent and relieve appellant from the charge of negligence, was for the exclusive consideration of the jury. They resolved the issues in respondent's favor, and their verdict, being supported by the evidence, cannot be disturbed.

Appellant further contends that the trial court erred in certain instructions to the jury. We have carefully read all the instructions and conclude that they correctly and clearly state the law applicable to the issues presented by the pleadings and the evidence. The appellant having pleaded the defense of assumption of risk, now takes exception to a portion of two instructions pertaining to that defense and quoted in its brief. Although certain language used in the quotation might, when separately and casually considered, appear objectionable, the entire instruction cannot be misunderstood, nor was it prejudicial. In any event, there was no evidence to sustain the affirmative defense of assumption of risk, and no instruction should have been given on that subject other than to withdraw it from the consideration of the jury.

The judgment is affirmed.

Rudkin, C. J., Mount, and Dunbar, JJ., concur.

[No. 8522. Department Two. July 16, 1910.]

FRANK E. SCHAAD, *Plaintiff and Appellant*, v. A. E. ROBINSON *et al.*, *Respondents and Cross-Appellants*, D. L. PETERS *et al.*, *Defendants and Appellants*.[1]

APPEAL—REVIEW—IMPROPER EVIDENCE. The improper admission of letters which were privileged, in an action tried to the court, is not ground for reversal, as they will not be considered on appeal.

COVENANTS—WARRANTY—QUALIFICATIONS—ESTATE GRANTED—EXCEPTION OF MORTGAGE. Where a deed of land subject to mortgage recited immediately after the description "clear of all incumbrances except" the mortgage, only the equity of redemption subject to the mortgage was granted; and a general warranty in the habendum clause, covenanting that the property is free of all incumbrances and that the grantor will warrant and defend the same against all lawful claims of all persons whomsoever, is qualified by the prior recital of the lien, and applies only to the estate granted and not to the lien.

MORTGAGES — CONVEYANCE SUBJECT TO — SUBSEQUENT CREDITORS—PARTIAL RELEASE OF MORTGAGE—EFFECT. Where a portion of mortgaged premises was conveyed subject to the mortgage, subsequent judgment creditors of the mortgagor are entitled to have the mortgage satisfied so far as possible out of the portion so conveyed; and if the mortgagee releases such portion of the mortgaged property, after notice of the judgment creditors' liens upon the balance, the judgment creditors are entitled to priority over the mortgagee in and to the proceeds of the balance of the mortgaged property, to the extent of the value of the property released.

EXECUTION—SALE PENDING CONTEST—MORTGAGES — FORECLOSURE—RELIEF. Where judgment creditors of a mortgagor were made parties to the foreclosure of a mortgage before they had issued execution on their judgments, which appeared of record as secondary liens, and pending the foreclosure they issued execution and bid in the property at execution sale while the question of the priority of their liens was being vigorously contested in the foreclosure suit, so that the property could not sell for its fair value, they acquire no title by virtue of the execution sale and sheriff's deeds, although the equities entitle them to priority in the proceeds of the property; since their equities can be protected in the foreclosure suit.

[1]Reported in 109 Pac. 1072.

Cross-appeals from a judgment of the superior court for Pacific county, Rice, J., entered August 4, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Sol. Smith, for appellants, to the point that the covenant against incumbrances in the Marion Cheek deed included the mortgage and rendered the balance of the land primarily liable for the mortgage debt, cited: Devlin, Deeds, § 848; 3 Pomeroy, Equity Jurisprudence (2d ed.), § 1224; Boone, Law of Real Property, §§ 304, 309, 313; Hopkins, Real Property, pp. 420, 421; *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 445; *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756.

Chas. E. Miller and *Welsh & Welsh*, for respondents.

Crow, J.—This foreclosure action, commenced by Frank E. Schaad against J. S. Doan, A. E. Robinson, D. L. Peters and Mrs. D. L. Peters, his wife, Carstens Packing Company, a corporation, and W. J. Wasson, has heretofore been in this court. *Schaad v. Robinson*, 50 Wash. 283, 97 Pac. 104. After the filing of the remittitur, plaintiff replied to the answers, and upon retrial, a decree was entered by which it was ordered that he recover judgment for $1,981.30 against the defendant Doan; that his mortgage be foreclosed on lot 1, block 11, Alta Vista addition; that the proceeds of the sale be first applied to the satisfaction of the attachment and judgment liens of the defendants A. E. Robinson and the Carstens Packing Company; that all proceedings had by A. E. Robinson and the Carstens Packing Company subsequent to the commencement of this action, relating to sales of the real estate, be set aside, canceled, and annulled, and that, after full payment of their judgments, the remainder of the proceeds of the real estate to be sold under the foreclosure decree herein be applied to the satisfaction of the plaintiff's

judgment against Doan. From this decree the plaintiff, Schaad, and the defendants Peters and wife have appealed. The defendants A. E. Robinson and the Carstens Packing Company have cross-appealed. There being two appeals, we will designate the parties as plaintiff and defendants.

The plaintiff, Schaad, and the defendants Peters and wife contend that the trial court erred in admitting certain letters in evidence. We find that all of them were properly admitted, except those written by D. L. Peters to attorneys in South Bend, which letters being privileged should have been excluded, and will be ignored on this appeal.

On a trial *de novo*, and after a careful consideration of the competent evidence, we find that on April 2, 1906, the defendant J. S. Doan, a single man, was the owner of lots 1, 2, 3, and 4, in block 2 of South Bend Land Company's first addition to South Bend, designated in the brief as "the Pioneer Building," and also lot 1, block 11, of Alta Vista addition to South Bend, designated in the briefs as the "Rainbow Cottage;" that on said date he executed and delivered to the defendant W. J. Wasson his note for $2,050, due in four months, together with his mortgage deed on both of the properties above described, to secure the same; that the Pioneer building was worth $5,000; that the Rainbow cottage was worth $1,300; that on June 20, 1906, the defendant J. S. Doan conveyed the Pioneer building to one Marion Cheek by warranty deed which expressed a consideration of $10, and "other valuable consideration"; that the true consideration was a lemon grove in California the value of which has not been shown; that the deed contained the following description and language:

"Lots numbered one (1), two (2), three (3), and four (4), in block numbered two (2) in the South Bend Land Company's First Addition to South Bend according to the plat thereof on record in the office of the auditor of said Pacific county, Washington, and commonly known as the Pioneer block.

"Clear of all incumbrances, except a mortgage of two thousand fifty dollars ($2,050).

"Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining; and also all estate, right, title and interest, at law and equity therein or thereto, including.

"To have and to hold, the same to the said Marion Cheek, his heirs and assigns forever; and I do covenant with the said Marion Cheek and his legal representatives forever, that the said real estate is free from all incumbrances, and that I will and my heirs, executors and administrators shall warrant and defend the same to the said Marion Cheek, heirs and assigns forever, against the lawful claims and demands of all persons whomsoever:"

that the deed was recorded in Pacific county on July 10, 1906; that thereafter, on July 14 and July 15, 1906, respectively, the defendant A. E. Robinson, and the defendant Carstens Packing Company, creditors of J. S. Doan, commenced separate actions against him in the superior court of Pacific county, and attached the Rainbow cottage property, to which J. S. Doan then held the record title; that they obtained separate judgments which became liens on the Rainbow cottage; that thereafter W. J. Wasson commenced an action in the superior court of Pacific county against J. S. Doan, Marion Cheek, A. E. Robinson, and Carstens Packing Company, to foreclose his mortgage; that pending such foreclosure the defendant D. L. Peters, by mesne conveyances, acquired record title to the Rainbow cottage, and thereafter, as agent for Frank E. Schaad, commenced negotiations with W. J. Wasson for the purchase of the note and mortgage, which resulted in their assignment and transfer, on November 20, 1906, to Schaad, who, through his agent Peters, then had actual notice of the judgment and attachment liens of Robinson and Carstens Packing Company; that the Wasson foreclosure suit was abandoned and dismissed; that on November 28, 1906, Schaad, for an expressed consideration of $550, in writing, released the Pioneer building, then of the value of $5,000, from the mortgage lien; that on January 25, 1907,

he commenced this action to foreclose the mortgage upon the Rainbow cottage alone, at which time Robinson and Carstens Packing Company held their judgment liens only, no executions having been issued thereon; that thereafter and during the pendency of this action, they issued executions and orders of sale, under which they purchased the Rainbow cottage at sheriff's sale; and that upon expiration of the period of redemption, sheriff's deeds were executed and delivered to them.

The defendants Robinson and Carstens Packing Company, on the trial, contended, and now contend, that the voluntary release of the Pioneer block from the mortgage lien by the plaintiff, Frank E. Schaad, after he had actual notice of their judgment and attachment liens on the Rainbow cottage, was prejudicial to their rights; that having such notice he could not release the Pioneer building and impose the entire burden of the mortgage lien upon the Rainbow cottage, and that the Pioneer building being of sufficient value to fully satisfy the entire mortgage debt, they should now be permitted to look to the Rainbow cottage for the satisfaction of their liens. These contentions were sustained in our former opinion. *Schaad v. Robinson, supra.* The plaintiff, Schaad, and the defendants Peters and wife contend, that the first alienation of a portion of the property described in the mortgage was made to Marion Cheek when he purchased the Pioneer building; that the mention of the mortgage in the deed to him, inserted immediately after the description, was merely a recital of its existence; that it was not mentioned or excepted in the subsequent warranty clause; that in legal effect the deed warranted the title against the lawful claims of all persons whomsoever, which included the mortgage deed; that Cheek, having acquired title before the attachments of Robinson and Carstens Packing Company had been levied on the Rainbow cottage, would be entitled to have the mortgage lien first satisfied from the Rainbow cottage, and that the defendants have not been injured by the partial release.

These contentions bring us to a construction of the deed from Doan to Cheek. If it was made subject to the mortgage, and the mortgage was not covered by the warranty, then Cheek would occupy no better position than his grantor Doan, the original mortgagor. There is no evidence, outside of the recitals in the deed, to show what value Cheek paid as a consideration for the Pioneer building. The words: "Clear of all incumbrances, except a mortgage of $2,050," appear immediately after the description, and the warranty clause without any exception therein expressed, appears later on. All parts of the deed must be considered. The property therein described is by explicit statement conveyed subject to the mortgage. When a grantor expressly states in an instrument of conveyance that it is subject to a certain specific lien, and then covenants that the real estate conveyed is free from incumbrances, and that he will warrant and defend against all lawful claims and demands of all persons, the prior recital of the lien qualifies the subsequent covenants and prevents their application to such incumbrance. *Jackson v. Hoffman*, 9 Cowen 271; *Freeman v. Foster*, 55 Me. 508; *Brown v. South Boston Savings Bank*, 148 Mass. 300, 19 N. E. 382.

Mr. Jones, in § 855, vol. 1, of his work on The Law of Real Property in Conveyancing, states the rule in the following language:

"A general exception of a mortgage or other incumbrance from the operation of a deed qualifies all the covenants. Thus where, immediately following the description, the land was declared to be subject to a mortgage described, and it was contended that, the mortgage not being excepted from the covenant against incumbrances, there was a breach of the covenant, it was held that the covenant did not apply to that incumbrance, which by the terms of the deed was excepted. The words 'subject to a mortgage' were used as a part of the description of the estate granted, and to that estate, thus qualified, the covenants apply."

In *Brown v. South Boston Savings Bank, supra*, the supreme judicial court of Massachusetts said:

"The words, 'subject to a mortgage of $10,000 to the South Boston Savings Bank and another mortgage of $1,500; are not added to the description of the land in the granting part to identify it, but to qualify the estate granted, and to that description as thus qualified the warranty applies. It receives its full force when applied to the subject of the grant, and that must be held to have been an equity of redemption; otherwise, the qualifying words are treated as without force. When the words, 'the aforegranted premises,' or 'the same,' are found in the habendum clause or in the covenants, it is to an estate granted which is subject to certain mortgages that they relate."

It is evident from the terms of the deed accepted by Cheek that he only purchased the equity of redemption in the Pioneer building, subject to the mortgage, and that he thereafter stood in no better position than Doan, his grantor. He would not be entitled to any equities to which Doan would not be entitled, and every equity which the defendants Robinson and Carstens Packing Company might have enforced against Doan they could have likewise enforced against Cheek. To protect their liens Robinson and Carstens Packing Company were entitled to have the mortgage satisfied as far as possible from a prior sale of the Pioneer building, and when Schaad released it from the burden of the mortgage, having actual knowledge of their liens, they at once became entitled to a priority over him, in and to the proceeds of the sale of the Rainbow cottage, to the extent of the value of the property he had so released. That value exceeded their entire claims, and the trial court properly ordered their liens to be first satisfied out of the proceeds of the sale of Rainbow cottage in this foreclosure action.

By their cross-appeals the defendants Robinson and Carstens Packing Company claim that this action should be dismissed for the reasons, that the mortgage had been fully paid and discharged before its pretended assignment to

Schaad, and that they, Robinson and Carstens Packing Company, having sold the Rainbow cottage under their judgments and orders of sale and having obtained sheriff's deeds, are entitled to the property. Neither of these contentions can be sustained. The defendants Robinson and the Carstens Packing Company do not seem to be contending for any priority between themselves. The evidence does not sustain their allegation that the mortgage was paid. It shows that it was purchased by Peters as agent for Schaad, with the latter's money, and there is no evidence to the contrary. It was, threfore, a valid lien on the Rainbow cottage which Schaad was entitled to foreclose in this action.

At the time of the commencement of this action, the defendants Robinson and the Carstens Packing Company had judgment liens and orders of sale on which no executions had been issued. Although they have asserted equitable rights which, by reason of Schaad's wrongful acts, must be enforced in this action, and result in a prior application of the proceeds of the sale of the Rainbow cottage to the satisfaction of their judgments, the public records nevertheless disclose the fact that their liens were apparently secondary. In other words, the mortgage lien was originally prior to theirs. The plaintiff lost his priority as against them by releasing the Pioneer building after he had actual knowledge of their judgments. They were made parties to this action in which the plaintiff vigorously disputed their right to a prior application of the proceeds of the sale of the Rainbow cottage. During the pendency of this issue, they caused the execution sales to be made. All execution or judgment sales should be so conducted as to promote competition and secure the best price. It is apparent that no one except the defendants would bid at their sales, as it was not then known whether the mortgage would ultimately be adjudged the prior lien. For a total purchase price of $502, the defendants bought property which on the trial of this action they have shown was actually worth $1,300. The trial court properly an-

nulled these sales, and directed a foreclosure and sale in this action.

The judgment is in all respects affirmed. Neither party will recover costs on this appeal.

RUDKIN, C. J., MOUNT, and DUNBAR, JJ., concur.

[No. 8903. Department Two. July 16, 1910.]

NATIONAL CITY BANK OF LAFAYETTE, INDIANA, *Respondent*, v. BENJAMIN F. HENDERSON, *Appellant*, E. J. LANE *et al.*, *Defendants*.[1]

ANIMALS—AGISTER'S LIEN—STATUTES—RETROACTIVE EFFECT. Rem. & Bal. Code, § 1197, giving an agister's lien for the care and keep of live stock was not intended to have any retroactive effect.

ANIMALS—AGISTER'S LIEN—STATUTES—CHATTEL MORTGAGES—PRIORITY. An agister's lien for the care and keep of live stock, under a statute taking effect after the execution of a chattel mortgage on the stock, is inferior and subject to the lien of the mortgage.

Appeal from a judgment of the superior court for Snohomish county, Carey, J., entered March 10, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions to foreclose a chattel mortgage and to enforce a lien for the keep and care of a horse. Affirmed.

James H. Naylor and *Merrick & Mills*, for appellant, contended, *inter alia*, that an agister's lien created by statute is paramount to the lien of a prior chattel mortgage upon the same property. Herman, Chattel Mortgages (1st ed.), 308; St. Joseph Brown's Admiralty Reports, 204; *Case v. Allen*, 21 Kan. 217, 30 Am. Rep. 425; *Willard v. Whinfield*, 2 Kan. App. 53, 43 Pac. 314; *Corning v. Ashley*, 51 Hun 483, 4 N. Y. Supp. 255; *Aylmore v. Kahn*, 11 Ohio Cir. Ct. 392, 5

[1]Reported in 109 Pac. 1038.

Ohio Dec. 410; *Tabor v. Salisbury*, 3 Col. App. 335, 33 Pac. 190; *Johnson v. Hill*, 3 Stark. 172; *Williams v. Allsup*, 10 C. B. (N. S.) 417; *Scott v. Delahunt*, 5 Lans. (N. Y.) 372; *Brown v. Holmes*, 13 Kan. 482, 492; *Colquitt & Baggs v. Kirkman*, 47 Ga. 555.

Wilson & Quinn and *Hulbert & Husted*, for respondent.

DUNBAR, J.—This is an action instituted by the plaintiff against the defendants, in which was sought by the respondent the foreclosure of a certain chattel mortgage on a horse called Janson, which mortgage was executed by defendants, the Lanes, to respondent, March 25, 1909, to secure the payment of the sum of $3,000, which said mortgage was filed for record in the office of the auditor of Snohomish county on the 27th day of March, 1909. The indebtedness secured was past due and unpaid at the date of the institution of the suit. The appellant took possession of the horse described in the chattel mortgage, under a contract with the defendants Lane, on the 17th day of April, 1907, and thereafter remained in the sole and exclusive possession of such horse up to the date of the trial of this action. Under such contract between the defendants Lane and the appellant there was, at the date of the trial, due the appellant for feeding, training, and caring for said horse the sum of $975.10. The actions for enforcement of the liens were tried together by stipulation. The court found the validity of both liens, but decreed that the lien of the respondent was prior, paramount, and superior to that of appellant, so that the issue upon the trial between the respondent and appellant was simply a question of priority of liens, and that is the sole question presented here.

The lien statute, upon which the appellant relies to sustain his contention of priority of his lien, went into effect on June 17, 1909. Laws 1909, p. 636 (Rem. & Bal. Code, § 1197 *et seq.*). The mortgage given by the defendants Lane to respondent was executed March 25, 1909. It is conceded that the horse, at the time of the execution and delivery

of the chattel mortgage, was in the possession of appellant under the contract aforesaid, for the mortgage, after describing the horse, uses this language, "located at Monroe, Snohomish county, Washington, in charge of B. F. Henderson, keeper." Section one of the lien statutes aforesaid is as follows:

"Any farmer, ranchman, herder of cattle, tavern keeper, livery and boarding stable keeper or any other person, to whom any horses, mules, cattle or sheep shall be entrusted for the purpose of feeding, herding, pasturing, and training, caring for or ranching, shall have a lien upon said horses, mules, cattle or sheep for such amount that may be due for said feeding, herding, pasturing, training, caring for, and ranching, and shall be authorized to retain possession of said horses, mules or cattle or sheep, until said amount is paid." Rem. & Bal. Code, § 1197.

Section two of the act (Rem. & Bal. Code, § 1199), provides for the manner of enforcing the said liens.

It is earnestly and eloquently contended by learned counsel for appellant that the view which was taken by the trial court in this case, in decreeing the priority of the mortgage lien, is not consonant with natural justice nor supported by reason, that it is not in harmony with the doctrine established by other courts of high authority, and that it is the law that a lien created by statute is paramount to a prior chattel mortgage upon the same property; and many cases are cited to sustain this contention. But it seems to us that learned counsel has failed to note the difference between a case where the agister or keeper was claiming a lien which was in force at the time the services were rendered and at the time the mortgage was given, and a case where he is depending for the establishment of his lien upon a statute which was enacted after the giving of the mortgage. An examination of this statute leads us to the conclusion that there was no attempt to give any retroactive effect to the statute, or confer any right of lien for services rendered before the going into effect of the lien statute; and this view would exclude the larger part

of the services upon which, and for which, the appellant is attempting to establish a priority. But as to the balance of the claim, under the authorities cited, the distinction above mentioned is fatal to the appellant's contention.

Appellant relies largely upon the case of *Case v. Allen*, 21 Kan. *217, 30 Am. Rep. 425, which he asserts is the leading case upon that subject. There, in an opinion written by the late Judge Brewer of the supreme court of the United States, it was held that where A gave B to secure a debt for the purchase money, a chattel mortgage on certain cattle, containing a stipulation that the mortgagor should remain in possession, and thereafter A placed the cattle in the possession of C who was engaged in the business of feeding and wintering cattle, to be fed and cared for during the winter, and they were in fact fed and wintered by C, C's lien upon the cattle for his reasonable charges for feeding and wintering was paramount and prior to the lien of the mortgage. But, while the statute in that case is not quoted, it is evident from a reading of the opinion that C's claim of lien was based upon a statute, the court remarking, during the discussion of the case, that a lien of the mortgage was prior in time, and was created by contract, while that of the agister, later in time, arises out of the statute. And, while the court uses the following language:

"Now, the lien of the agister is not the mere creature of the contract. It is created by statute from the fact of the keeping of the cattle. The possession of the agister was rightful; and, the possession being rightful, the keeping gave rise to the lien; and such keeping was as much for the interest of the mortgagee as the mortgagor. The cattle were kept alive thereby; and the principle seems to be where the mortgagee does not take the possession, but leaves it with the mortgagor, he thereby assents to the creation of a statutory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged;"

it evidently meant that he consented to the priority of the lien which was already provided for by statute, and that

there was no intention on the part of the court to announce the doctrine that an act of the legislature, subsequent to the execution of a contract, could have force and effect to change the terms of the contract, to the injury of either of the contracting parties. Judge Brewer had occasion to review this question afterwards, as a member of the supreme court of the United States, in *Toledo etc. R. Co. v. Hamilton*, 134 U. S. 296, where it was held that a recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien whose priority cannot be displaced thereafter, either directly by a mortgage given to the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction. This is an important case, and *Case v. Allen*, *supra*, was not mentioned in the decision, and evidently was not regarded as holding to a different doctrine from that announced by the learned judge in the opinion from which we are quoting. In this latter case it was said:

"To what extent, if at all, a mechanic's lien could, under the statutes of Ohio in force at the time Hamilton attempted to file his lien, be placed upon a railroad, or any part of it, may be a matter of doubt,"

citing some cases and statutes, and then adding:

"It is unnecessary in this case to express any opinion about the matter, for if a mechanic's lien was affected, it was subordinate to the lien of the prior mortgage. There was no statute in force at the time the mortgage was executed giving any priority to subsequent mechanic's liens; and by the mortgage the mortgagee took its vested priority, beyond the power of the mortgagor or the legislature thereafter to disturb."

This case would seem to be decisive in principle of the case at bar. *Willard v. Whinfield*, 2 Kan. App. 53, 43 Pac. 314, simply follows the rule announced in *Case v. Allen*. *Brown v. Holmes*, 13 Kan. 482, also written by Judge Brewer while he was a member of the supreme court of Kansas, simply announced incidentally that the agister had a lien for the win-

tering of the cattle, and that this lien was paramount to the rights of the chattel mortgage, the case being a replevin action and the real contest over questions which do not involve the question in this case. In *Aylmore v. Kahn*, 5 Ohio Cir. Dec. 410, the priority of the lien of the agister was asserted, but in that case the services had been rendered shortly before the commencement of the action in 1896, and the statute conferring the lien was passed in April, 1890. An examination of all the other cases shows the same state of facts. There is no case that we have been able to find where there has been an attempt to establish the priority of an agister's lien where the statute conferring the lien had been passed subsequent to the execution, delivery, and recording of the mortgage. This must necessarily be so, for the lien is purely statutory, and to the statute alone the agister must look for his lien. The cases cited from admiralty courts, it is conceded, are an exception to the rule, for the reason that a lien was given at common law to persons who repaired ships, based upon the theory that, as it is obvious that every ship will from time to time require repairs, it seems but reasonable to infer that the mortgagor has authority from the mortgagee to cause such repairs as should become necessary to be done upon the usual and ordinary terms.

Finding no error, the judgment will be affirmed.

RUDKIN, C. J., PARKER, CROW, and MOUNT, JJ., concur.

[No. 8807. Department Two. July 16, 1910.]

In the Matter of the Estate of FRED HOSS, *Deceased.* GOTTLIEB MAHLER *et al.*, *Appellants*, v. F. B. GOETTER, *Respondent.*[1]

EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS — CREDITORS. Assignments of claims after the death of the decedent, do not entitle the assignee to letters of administration as a "creditor" of the decedent.

EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS—RELATIVES—STATUTES — CONSTRUCTION — PROVISOS. Under Rem. & Bal. Code, § 1389, specifying the next of kin entitled to letters of administration upon the estate of a deceased person and fixing the order of their right, followed by "principal creditors", with the proviso that if the persons entitled fail to apply within forty days, or if there be no relatives or next of kin, or creditors, the court may appoint any suitable person, the general words in the proviso, "no relatives or next of kin," must be construed to mean no relatives or next of kin specified in the enacting clause as entitled to letters, and other relatives have no prior right and cannot object to the appointment of any suitable person.

Appeal from an order of the superior court for Stevens county, Carey, J., entered January 6, 1910, granting letters of administration upon the estate of a deceased person upon hearing contested applications therefor. Affirmed.

Birdseye & Smith, for appellants.

Jackson & Bailey and *Jesseph & Grinstead*, for respondent.

RUDKIN, C. J.—Fred Hoss died intestate in Stevens county, in this state, on the 15th day of October, 1909, leaving an estate therein subject to administration. The heirs at law and next of kin of the decedent are two brothers and two sisters who are nonresident aliens, and therefore not qualified to take out letters of administration on his estate. One F. B. Goetter, claiming to be a creditor of the decedent, petitioned

[1]Reported in 109 Pac. 1071.

for letters of administration, and a cross-petition was filed by Gottlieb Mahler and Louisa Wormald, an uncle and a cousin of the decedent. The court below found that the petitioner Goetter was a principal creditor of the decedent, and that the petitioners Mahler and Wormald were not within the degrees of kinship entitling them to any priority in the grant of administration on the estate. Upon these findings an order was entered appointing the petitioner Goetter as administrator, and from this order the other petitioners have appealed.

If the claim of the respondent rested upon his status as a creditor, the order appealed from should not be sustained. His claim rests entirely upon assignments taken by him since the death of the intestate, and whatever equities might exist in favor of an assignee in other cases, we are convinced that a person who buys claims against an estate for the purpose of qualifying himself as an administrator acquires no rights by his purchase. Such a proceeding savors too much of the purchase of the right to administer an estate and is against the policy of the law. Schouler, Executors, § 115; 11 Am. & Eng. Ency. Law (2d ed.), 774; 18 Cyc. 90; *Pearce v. Castrix*, 53 N. C. 71.

In support of the opposite rule, counsel cite *In re Sullivan's Estate*, 25 Wash. 430, 65 Pac. 793, but the right of an assignee of a claim to administer upon an estate was neither involved nor considered in that case. However, if the appellants have no rights under the statute, they are in no position to complain, and that question we will now consider. The probate act of 1873 granted the right of administration in the following words:

"Administration of the estate of a person dying intestate, shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:

"(1) The surviving husband, or wife, or such person as he or she may request to have appointed.

"(2) The next of kin in the following order: (1) Child or

children; (2) father or mother; (3) brothers or sisters; (4) grandchildren.

"(3) To one or more of the principal creditors: *Provided*, that if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, the probate court or judge may appoint any suitable and competent person to administer such estate." Laws of 1873, p. 269, § 90.

Subdivision 3 of this section was amended in 1881 to read as follows:

"To one or more of the principal creditors: *Provided*, that if the persons so entitled or interested shall neglect, for more than 40 days after the death of the intestate, to present a petition for letters of administration, or if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors in writing waive their right to administer, or if there be no principal creditor or creditors, then the probate court or judge may appoint any suitable and competent person to administer such estate." Laws of 1881, p. 6, § 1.

And thus the statute reads today. Rem. & Bal. Code, § 1389.

Under the act of 1873 the right to administer upon an estate was not granted to the next of kin generally, but only to those especially enumerated, and if they have such a right now it must be derived from the 1881 amendment to the proviso. It will be conceded that the language of the proviso is much broader than the enacting clause, for it provides "that if there be no relatives or next of kin, . . . the probate court or judge may appoint any suitable and competent person to administer such estate." From this language it is plausibly argued that the right to appoint any suitable and competent person only exists where there are no relatives or next of kin. But in the construction of this statute two cardinal rules must be kept in mind. First,

"The office of the proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview; its office is not

to confer a power, or as a general rule to enlarge the enactment to which it is appended so as to operate as a substantive enactment itself;" 26 Am. & Eng. Ency. Law (2d ed.) 678.

And second, where particular words in a statute are followed by general words, the general words will be limited to the same class as the particular. *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469, 64 Pac. 778.

The general words in this proviso; viz., *no relatives or next of kin*, must therefore be construed to mean no relatives or next of kin such as are defined or specified in the enacting clause. The amendment of 1881 was not intended to enlarge or extend the rights of the next of kin, but rather to enlarge the power of the court to appoint other suitable and competent persons. From a full consideration of the case we are, therefore, satisfied that the appellants have no prior right to administer upon the estate in question, and the judgment of the court below is accordingly affirmed.

MOUNT, CROW, DUNBAR, and CHADWICK, JJ., concur.

[No. 8849. Department Two. July 16, 1910.]

AGNES W. B. SHEPARD *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—ORDINANCE—VALIDITY. Where an ordinance regulates several kinds of hospitals by provisions that are severable both as to the character of the institutions and the requirements to be met, some of the requirements may be valid and others invalid, or they may be valid as to one kind of an institution and invalid as to another; and it will be upheld in so far as it is valid.

MUNICIPAL CORPORATIONS—POLICE POWER. In all matters pertaining to the public health and safety, substantially the entire police power of the state is vested in municipal corporations of the first class.

[1]Reported in 109 Pac. 1067.

MUNICIPAL CORPORATIONS—POLICE POWER—HOSPITALS — REGULATIONS. Under the police power, a city of the first class may prohibit the maintenance of a private hospital tending to spread contagious diseases in crowded localities, and may require the same to be connected with the sewers of the city.

SAME—NUISANCES—PRIVATE HOSPITALS FOR INSANE. It is a proper exercise of the police power for an ordinance of a city of the first class to declare any private hospital or sanitarium for the treatment of inebriates or persons suffering from insanity or other mental diseases to be a public nuisance, unless its location and maintenance are consented to in writing by the owners of private property situated within 200 feet of the hospital buildings; since it would practically destroy the value of all residential property in its immediate vicinity, and the danger differs in kind rather than in degree.

SAME—PERMIT FOR PRIVATE HOSPITAL. The provision requiring a written permit from the city commissioners of health, in an ordinance prohibiting the maintenance of a private hospital for the treatment of the insane except under certain conditions, is not objectionable as an unreasonable exercise of the police power.

MUNICIPAL CORPORATIONS—ORDINANCE—VALIDITY — MOTIVE — JUDICIAL POWER. A general ordinance, valid on its face, is not rendered void by the fact that it was passed at the solicitation of persons residing in a certain locality as a local and special regulation; as the motives of the council cannot be inquired into by the courts.

Appeal from a judgment of the superior court for King county, W. T. Dovell, Esq., judge *pro tempore*, entered March 14, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to restrain the enforcement of an ordinance. Affirmed.

Butler & Crews, *Shepard & Flett*, and *Shepard & Daly*, for appellants, contended, among other things, that the hospital is not a nuisance *per se*. *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 35 Am. St. 152, 19 L. R. A. 727; *Quintini v. City of Bay, St. Louis*, 64 Miss. 483, 1 South. 625, 60 Am. Rep. 62; *In re Quong Woo*, 13 Fed. 229; *Stockton Laundry Case*, 26 Fed. 611; *In re Sam Kee*, 31 Fed. 680; *In re Hong Wah*, 82 Fed. 623; *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; *City of Shreveport v. Robinson*, 51 La. Ann. 1314, 26 South. 277; *Yick Wo. v. Hop-*

kins, 118 U. S. 356; *Musgrove v. Catholic Church of St. Louis*, 10 La. Ann. 431; *New Orleans v. Wardens of Church of St. Louis*, 11 La. Ann. 244; *Town of Lake View v. Letz*, 44 Ill. 81; *Payne v. Wayland*, 131 Iowa 659, 109 N. W. 203; *Wygant v. McLauchlan*, 39 Ore. 429, 64 Pac. 867, 87 Am. St. 673, 54 L. R. A. 636; *State ex rel. Board of Health of Hamilton Township v. Inhabitants of Trenton* (N. J.), 63 Atl. 897; *Frazer v. Chicago*, 186 Ill. 480, 57 N. E. 1055, 78 Am. St. 296, 51 L. R. A. 306; *Veraguth v. Denver*, 19 Colo. App. 473, 76 Pac. 539. And the injury must be not a merely fanciful one. Wood, Nuisance, § 673; *Elliott v. Ferguson*, 37 Tex. Civ. App. 40, 83 S. W. 56; *Ponder v. Quitman Ginnery*, 122 Ga. 29, 49 S. E. 746. The fact that a business or trade impairs the value of adjoining property does not make it a nuisance unless it results in actual physical discomfort, or a tangible, visible injury to the property itself. *Perry v. Howe Co-op. Creamery Co.*, 125 Iowa 415, 101 N. W. 150; *Town of Frostburg v. Hitchins*, 99 Md. 617, 59 Atl. 49; *Stein v. Lyon*, 91 App. Div. 593, 87 N. Y. Supp. 125; *Gallagher v. Flury*, 99 Md. 181, 57 Atl. 672; Freund, Police Power, § 178; *Boyd v. Board of Councilmen of Frankfort*, 25 Ky. Law, 1311, 77 S. W. 669; *Louisville & Northern Terminal Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188. As to the power of a city council to declare things nuisances, see *City of Passaic v. Paterson Bill Posting etc. Co.*, 72 N. J. L. 285, 62 Atl. 267; *Town of Frostburg v. Hitchins, supra; Brown v. Town of Carrollton*, 122 Mo. 276, 99 S. W. 37. To justify public legislative interference with it, its injurious character must rest upon something more than its proximity to property in private ownership, and must affect some other and more public interest than the mere value of the private right of property in neighboring land. *Town of Fulton v. Norteman*, 60 W. Va. 562, 55 S. E. 658, 9 L. R. A. (N. S.) 1196; *Gallagher v. Flury*, *Perry v. Howe Co-op. Creamery Co.*, and *Stein v. Lyon*, *supra*. An ordinance procured to be passed for a private

and not for a public purpose is against public policy. *In re Frederick Street*, 12 Pa. Co. Ct. 577; *Town of Fulton v. Norteman*, and *Yick Wo v. Hopkins*, *supra*. Ordinances must be reasonable. Dillon, Municipal Corporations (4th ed.), § 319; *Corrigan v. Gage*, 68 Mo. 541; *St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. 575, 42 L. R. A. 686; *Mayor etc. of Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *State, Long, pros. v. Mayor etc. of Jersey City*, 37 N. J. L. 348; *Austin v. Murray*, 16 Pick. 121; *Lake Shore etc. R. Co. v. Smith*, 173 U. S. 684; Tiedeman's Limitations of Police Power, § 194; Freund, Police Power, §§ 63, 142. The regulation must tend to remove danger. Freund, Police Power, §§ 148, 149; *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 75 Am. St. 93, 48 L. R. A. 261; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 79 Am. St. 238, 52 L. R. A. 287. And the restraint must be proportionate to the danger. *Toledo etc. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611. The ordinance was void because it required the consent of the health commissioners. *Spokane v. Camp*, 50 Wash. 554, 97 Pac. 770, 126 Am. St. 913; *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; *Tilford v. Belknap*, 31 Ky. Law 662, 103 S. W. 289, 11 L. R. A. (N. S.) 708; *In re Quong Woo*, and *Austin v. Murray*, *supra*. The authorities are all against such grants of arbitrary administrative power. Freund, Police Power, §§ 643-5; *City Council of Montgomery v. West*, 149 Ala. 311, 42 South. 1000, 9 L. R. A. (N. S.) 659; *City of Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621; *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 93 Am. St. 394, 59 L. R. A. 282; *In re Camp*, 38 Wash. 393, 80 Pac. 547; *White v. Mears*, 44 Ore. 215, 74 Pac. 931; *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 79 Am. St. 238, 52 L. R. A. 287; *St. Louis v. Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; *Wong Wai v. Williamson*, 103 Fed. 1; *Jew Ho v. Williamson*, 103 Fed. 10; *Yick Wo v. Hopkins*, *supra*; *In re Jacobs*, 98 N. Y. 98, 50 Am.

Rep. 636; *Hume v. Laurel Hill Cemetery*, 142 Fed. 552. If any part of the ordinance is bad it is all bad. *Austin v. Murray, supra; Warren v. Mayor, etc. of Charlestown*, 2 Gray (Mass.) 84; *Daly v. Morgan*, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757; *Robinson v. Bidwell*, 22 Cal. 379; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116.

Scott Calhoun, H. D. Hughes, and *Peters & Powell*, for respondent.

RUDKIN C. J.—This action was instituted by the plaintiffs, as owners and lessees of certain property in the city of Seattle, to restrain the city from enforcing, as against the plaintiffs and their property, the provisions of an ordinance entitled, "An ordinance regulating the location and maintenance of private hospitals and sanitariums, and providing for penalties for the violation of the provisions hereof, and declaring an emergency."

Section one of the ordinance reads as follows:

"No private hospital or sanitarium shall be established or maintained within the city of Seattle in any building in which any of the sinks or water closets or other drainage are not connected with the public sewers of the city, nor shall any private hospital or sanitarium for the treatment of inebriates or persons suffering from insanity or other mental diseases be established or maintained in any buildings situated within two hundred (200) feet of any private property the owner of which has not consented in writing to the location and maintenance of such hospital or sanitarium, nor in any building without the written permit from the commissioners of health of the city of Seattle." Seattle Ordinance, No. 20,008.

Section two provides a penalty for any violation of the provisions of section one; section three declares any hospital or sanitarium established or maintained contrary to the provisions of section one to be a public nuisance and provides for its abatement; and section four declares an emergency. The court below made findings of fact and conclusions of law, and entered judgment dismissing the action. From the judgment

of dismissal, the plaintiffs have appealed, and the case is brought here for review on the findings of the court, without a statement of facts or bill of exceptions. The material findings made by the trial court are the following:

"The plaintiffs Shepard for more than five years last past have been and are the owners of certain real estate in the city of Seattle, described as lots one (1), two (2), three (3), ten (10), eleven (11) and twelve (12), in block nineteen (19) of John J. McGilvra's second addition to Seattle, upon which there is being conducted by the plaintiffs Loughary and Williamson, who hold said premises under a lease from the plaintiffs Shepard bearing date the 10th day of December 1908, a sanatorium for the treatment of persons suffering from nervous and mental diseases, including insane persons. About the year 1902 the plaintiffs Shepard erected on said premises, for residence purposes, the building now in use under said lease as the main sanatorium building, and subsequently the other two buildings thereon, which are small cottages; and about the time of making said lease they, in compliance with its terms, commenced to make sundry valuable improvements upon said buildings and premises, involving a total expense to them of about four thousand dollars, but which improvements were not entirely completed at the time of the passage of the ordinance giving rise to this suit.

"(2) Said premises are situated at a distance of about three miles from the center of business in said city, and in a region suitable for residence purposes and in which such residences as have been erected are of good character; but there is only one house upon the remainder of the block containing said premises (the same being a residence situated on the southwest one-quarter of said block, about sixty feet south of said main sanatorium building, and the grounds whereof comprise said entire quarter-block)—the plaintiffs' said premises comprising the entire north half of said block —and there is only one house upon the block next west of that containing said premises (the grounds of which residence comprise said entire block), there are no houses on the block next west or on the block diagonally northwest of that containing said single residence, only three on the block diagonally northwest of that containing the plaintiffs' said premises, only three on the block next north of that containing

said premises, one on the block diagonally northeast of that containing said premises (on the corner thereof most distant from the plaintiffs' said premises), two or three on the easterly side of the block next east of that containing said premises, none on the block diagonally southeast of that containing said premises, two on the block next south of that containing said premises, and one on the block diagonally southwest of that containing said premises (the grounds of which residence comprise said entire block); each of said blocks consisting of twelve full-size lots of average dimensions of about sixty by one hundred and twenty feet. A great many of the lots in said region are not yet cleared up, and have original forest growth upon them; and there is a large tract of practically unoccupied ground, with very few houses upon it, lying north of Madison street, between said street and Union Bay, on the same hill as the plaintiffs' said premises.

"(3) Said premises are situated on a hillside sloping toward Lake Washington, having natural adaptation for drainage. All said buildings thereon are connected with septic tanks on said premises, built of concrete; the septic tank connected with said main sanatorium building, which was the earliest built of said tanks, was built according to plans and specifications furnished therefor to the plaintiffs Shepard by the city engineer of the defendant, of ample capacity to accommodate a building of that size, long prior to the use of said premises for sanatorium purposes; and prior to the occupation of said premises for sanatorium purposes the board of health of the defendant made an examination of the premises and found them to be in a sanitary condition.

"(4) The plaintiffs Loughary and Williamson are regularly licensed physicians and surgeons, and especially skilled in the treatment of nervous and mental diseases; and in said sanatorium they care for a number of patients who are thus afflicted, including some who are insane. It is not their purpose to harbor as inmates any violent or dangerous persons, but they claim and have the right under their said lease to harbor on said premises persons suffering from any and all kinds of insanity. The windows of said sanatorium are barred with iron screens, and there is a sufficient force of trained nurses, attendants and guards properly to care for the patients and inmates of said institution, and said windows are so barred for the purpose of preventing any of said

patients from escaping, and attendants and guards are employed for the same purpose; but said premises are not fenced or otherwise inclosed. Said lessees have expended about three thousand dollars in furnishing and equipping said sanatorium.

"(5) Said lease was in full force and effect and said lessees were in possession of said premises thereunder and using the same for the purposes of a sanatorium prior to the passage of ordinance No. 20,008 of the city of Seattle, the passage of which ordinance gave rise to this suit.

"(6) Said sanatorium is not connected with the public sewers of said city, and consent to the location and maintenance thereof on said premises has not been obtained from the owners of any of the private property situated within two hundred feet of the buildings in which it is maintained, and no permit for its maintenance in said buildings has been granted by the commissioners of health of the defendant; but there is no public sewer of said city within one thousand (1,000) feet nor within three blocks of said buildings, and ordinance No. 16,372 of said city provides that buildings which are put to ordinary uses must be connected with the public sewers of said city only when there is a sewer within one block of such buildings. There is no block exceeding three hundred (300) feet in length among those surrounding that in which said sanatorium is situated."

In support of their assignments of error the appellants contend, that "A private sanatorium for the care of persons suffering from insanity or other mental diseases is not a public nuisance *per se*, and cannot be made a public nuisance, if not such in fact, by mere declaration of a municipal legislature;" that "the findings of the trial court establish that the plaintiffs' sanatorium is not a public nuisance in fact," and that the ordinance deprives the appellants of their property without due process of law, and denies to them the equal protection of the law, in violation of the state and Federal constitutions.

The ordinance applies to different kinds of hospitals and sanitariums, and prescribes different requirements with which those desiring to establish and maintain such institutions must comply. The provisions of the ordinance are sever-

able, both as to the character of the institution and the requirements to be met or complied with. Some of these requirements may be valid and others invalid, or they may be valid as to one kind of an institution and invalid as to another. *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053; *City of Eureka v. Wilson*, 15 Utah 67, 48 Pac. 150, 62 Am. St. 904; *Bailey v. State*, 30 Neb. 855, 47 N. W. 208; *Mayor etc. of Birmingham v. Alabama G. S. R. Co.*, 98 Ala. 134, 13 South. 141; *Ex parte Bizzell*, 112 Ala. 210, 21 South. 371; *State ex rel. Lamar v. Dillon*, 42 Fla. 95, 28 South. 781; *Baker v. Lexington*, 21 Ky. Law 809, 53 S. W. 16; *Rockville v. Merchant*, 60 Mo. App. 365. In the discussion of this case we will, therefore, limit ourselves as far as practicable to hospitals or sanitariums for the treatment of persons suffering from insanity or other mental diseases, such as the lessees propose to establish and maintain on the premises in question.

"It is a proper exercise of the police power of the state to prohibit the establishment of private hospitals in localities where by reason of the crowded condition of the neighborhood, or for other reasons, such location would tend to spread contagious diseases, and in the exercise of its police power a municipality may prescribe reasonable regulations for the draining of the premises of private hospitals within the city limits, for the purification and ventilation of the buildings, for the removal therefrom of any patients having infectious or contagious diseases, and for the general management of the hospital grounds and buildings. In Pennsylvania by statutory enactment it has been made unlawful 'hereafter to establish or maintain any additional hospital . . . in the built-up portions of cities; provided, however, that nothing herein contained shall be so construed as to prevent the maintenance of any hospital . . . now lawfully established and maintained.'" 21 Cyc. 1110.

Cooley, Constitutional Limitations (6th ed.), 740 *et seq.*

Thus in *Milne v. Davidson*, 5 Martin, N. S. (La.) 409, 16 Am. Dec. 189, an ordinance of the city of New Orleans, prohibiting the erection of private hospitals within the city

limits, was upheld as a valid police regulation, but the decision was perhaps controlled in a measure by local sanitary conditions. In *Commonwealth v. Charity Hospital of Pittsburg*, 198 Pa. 270, 47 Atl. 980, an act prohibiting the establishment or maintenance of additional hospitals in the built-up portions of cities was sustained as a valid exercise of the police power.

In *Bessonies v. Indianapolis*, 71 Ind. 189, cited by the appellants, it was held that an ordinance of the city of Indianapolis prohibiting the establishment or maintenance of hospitals within the city limits, without a license or a permit from the common council, was not within the powers conferred upon the city by the legislature of the state, but the power of the state itself was not involved or considered. And we might say in this connection that no question is here involved as to the power of the city of Seattle, as contradistinguished from the power of the state itself, for in all matters appertaining to the public health and public safety substantially the entire police power of the state is vested in municipal corporations of the first class. *Smith v. Spokane*, 55 Wash. 219, 104 Pac. 249. But even in the *Indianapolis* case the court conceded that,

"Under its police powers, the city, by its law-making authorities, might, perhaps, prescribe reasonable rules and regulations for the drainage of the hospital grounds, the purification and proper ventilation of the buildings, for the removal therefrom of any person afflicted with infectious or contagious diseases, and for the general management and government of the hospital grounds and buildings, both internally and with relation to the adjacent and surrounding property; and such reasonable rules and regulations may doubtless be enforced with proper penalties."

This authority would sustain the provision of the present ordinance requiring hospitals to connect with the public sewers of the city—at least such hospitals as harbor persons suffering from infectious or contagious diseases. Whether reasonable as to a hospital of the character here in question

we need not inquire, for we are convinced that the second requirement of the ordinance is both reasonable and valid. The ordinance, in effect, declares that any private hospital or sanitarium for the treatment of inebriates, or persons suffering from insanity or other mental diseases, is a public nuisance, and shall be abated as such, unless its location and maintenance are consented to in writing by the owners of private property situated within two hundred feet of the hospital buildings. This, in our opinion, is a valid and reasonable police regulation. The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities, if located within two hundred feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution in a residential portion of a city would practically destroy the value of all property within its immediate vicinity for residence purposes. If so, it was proper and competent for the municipal authorities to require the assent of the injured parties to its location and maintenance. *Spokane v. Camp*, 50 Wash. 554, 97 Pac. 770, 126 Am. St. 913.

In the argument before this court much stress was laid on the case of *Ex parte Whitwell*, 98 Cal. 73 32 Pac. 870, 35 Am. St. 152, 19 L. R. A. 727, but the two cases have little in common, aside from the fact that the two ordinances under consideration are directed against substantially the same business or occupation. The petitioner in that case had purchased 22 acres of land in San Mateo and constructed hospital buildings thereon at great expense. The ordinance directed against him and his property was extremely onerous in its terms. It prohibited the maintenance of such hospitals in any but fireproof buildings; it prohibited their location within 400 yards of any school or residence; it required the construction of a brick or stone wall, 18 inches thick and 12 feet high, around the hospital buildings and grounds, and contained other provisions of a like nature. While the su-

preme court of California held that the ordinance was unreasonable and void, it nevertheless conceded that,

"In the management of a hospital where insane persons are treated, it is necessary, and it must be presumed that there will be a sufficient number of competent attendants to prevent danger or damage from any unreasonable actions of such insane persons. Without such attendants no such asylum or hospital could be properly conducted."

Again the court said,

"The board of supervisors of a county, or the legislative department of any city or town in which such an asylum is erected, may, undoubtedly, provide by ordinance that patients therein shall not be permitted to leave the grounds upon which it is erected, unless accompanied by an attendant, and may impose a penalty upon the superintendent or keeper of such asylum for a failure to conform to such regulation."

The court here recognizes the self-evident fact that insane persons are dangerous, and if so, may not a city protect itself against them by excluding private insane asylums from its limits? May it not refuse to entrust the safe keeping of this dangerous class to private parties, in whose selection it has no choice, and over whose conduct it has no direct control?

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts." *In re Jacobs*, 98 N. Y. 98, 110, 50 Am. Rep. 636.

"In the exercise of this power the legislature has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety." *People v. Havnor*, 149 N. Y. 195, 200, 43 N. E. 541, 52 Am. St. 707, 31 L. R. A. 689.

"The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of rights, reason and expediency with the law-making power." Cooley, Constitutional Limitations (6th ed.), 201.

Hospitals for the treatment of patients suffering from infectious and contagious diseases have often been adjudged nuisances, when located in the residential parts of cities and towns (*Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. 566; *Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215); and danger from the immediate presence of a hospital of this kind differs in kind rather than in degree.

The third requirement of the ordinance is a written permit from the city commissioners of health, but this requirement is apparently for the purpose of showing that the other provisions of the ordinance have been complied with. In any event the requirement is unobjectionable in itself. *Wilson v. Eureka City*, 173 U. S. 32.

The appellants further contend that the ordinance is void because the answer admits that it was enacted "At the solicitation of persons residing in the vicinity of said premises, and solely in their behalf as a local and special regulation." We are not permitted to inquire into the motives of the city council. If the ordinance is valid on its face, the reasons or arguments that may have moved the city council to act are not pertinent here.

There are many unpleasant and annoying things that must be borne by those living in a state of organized society, in order that others may enjoy their equal rights under the law, but the preservation of the public health and public safety is one of the chief objects of local government, and every citizen holds his property subject to a reasonable exercise of the police power of the state.

In our opinion this ordinance is a reasonable and proper application of the time-honored maxim, *sic utere tuo ut alienum non laedas*, and is sustained by the maxim, *salus populi suprema est lex*, in which the police power of the state finds its chief support.

The judgment of the court below is therefore affirmed.

CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 8879. Department Two. July 16, 1910.]

CASCADE PUBLIC SERVICE CORPORATION, *Successor to A. C. Corbett, Appellant*, v. FANNIE M. RAILSBACK, *Executrix, etc., Respondent, and* NISQUALLY POWER COMPANY, *Intervener.*[1]

PUBLIC LANDS — HOMESTEAD — CONVEYANCE BEFORE FINAL PROOF. Under U. S. Rev. St. §§ 2290, 2291, the transfer of any interest in a homestead before final proof, except as expressly authorized by law, is contrary to public policy and void.

SAME—RIGHT OF WAY — WATER RIGHTS — STATUTES. The alienation by a homesteader, before final proof, of a right of way for a water flume to convey water for power purposes is void, since it is not within U. S. Rev. St. § 2288, as amended by 26 St. at L. 1097, authorizing the conveyances of a right of way for railroads, canals, reservoirs, or ditches "for irrigation or drainage across it," nor would the conveyance of the "water right" be within said statute.

SAME—TRANSFERS RATIFIED AFTER FINAL PROOF—SPECIFIC PERFORMANCE. A contract for the conveyance of an interest in a homestead, void because made before final proof, is not ratified or rendered valid by a tender of performance and the acceptance of part of the purchase price, after final proof, so as to authorize specific performance of the contract, since the plaintiff is relying on the original contract, which was against public policy and unenforcible regardless of consideration by the court of the parties to it.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 17, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for specific performance. Affirmed.

Geo. M. Sinclair (*George D. Emery*, of counsel), for appellant.

Stallcup & Keyes, for respondent.

Hayden & Langhorne, for intervener.

[1]Reported in 109 Pac. 1062.

RUDKIN, C. J.—On the 10th day of July, 1905, the defendant Warren entered into a contract with the plaintiff, Corbett, whereby, in consideration of the sum of $1,250, the former agreed to convey to the latter,

"A strip and parcel of land one hundred feet wide hereafter to be surveyed in the northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter and lot two of section four, township fifteen, north range four, east of the Willamette Meridian. . . . Said strip of land to be used for a right of way for a water flume to convey the waters of the Nisqually river from a point of diversion to be selected by A. C. Corbett, above and south of said premises to some point on said river either in or below said premises, said water so conveyed to be used for power purposes for generating electricity or other power, as the said A. C. Corbett, his heirs or assigns may desire."

One hundred dollars of the purchase price was paid at the execution of the contract, and the balance was to be paid on the execution of a deed within thirty days thereafter. On the 5th day of August, 1905, an additional $250 was paid on the purchase price, and the time for full and complete performance of the contract was extended for a period of sixty days from and after the 10th day of August, 1905. The complaint alleged a survey and selection of the right of way, a tender of full performance of the contract on the part of plaintiff on the 7th day of October, 1905, and again on the 4th day of December, 1905, a refusal to perform on the part of the defendant, and prayed for specific performance. The Cascade Public Service Corporation was later substituted as plaintiff, as successor in interest to the original plaintiff, and the Nisqually Power Company intervened as successor in interest to the defendant. At the time this contract and extension were entered into, the defendant Warren was an occupant of the land over which the proposed right of way was granted, under the homestead laws of the United States, and did not make his final proof until the 28th day of September, 1905. The court below seems to have decided the case against

the plaintiff on the pleadings, holding that the contract between Warren and Corbett was in contravention of the laws of the United States and void, but the case was nevertheless heard on the facts, apparently for the purpose of making a record for this court. At the close of the trial, a final judgment was entered in favor of the defendant and intervener, from which this appeal is prosecuted.

Section 2290 of the Revised Statutes of the United States provides that a person applying for the entry of a homestead claim shall make affidavit, that, among other things, "Such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." Section 2291 prescribes the time and manner of making final proof, and requires the applicant to make affidavit, "that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight."

Section 2288, as amended by the act of 1891, provides that,

"Any *bona fide* settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim." 26 Stats. at Large, ch. 561, page 1097.

It is firmly established that any contract or agreement by a homesteader to transfer his claim or any interest therein, before final proof, except as expressly authorized by the laws of the United States, is contrary to public policy and void.

In *Mellison v. Allen*, 30 Kan. 382, 2 Pac. 97, the court, speaking through M. Justice Brewer, said:

"On the other hand, it is contended that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years, and upon his making no disposition or alienation during such term; that the affidavit

of nonalienation is as clear an expression of the legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on prejury is illegal, that both purchaser and vendor are parties to the wrong, and that courts refuse to enforce such a contract, not from any regard to the vendor, but from motives of public policy; and finally, that courts of equity have always exercised a discretion in enforcing the specific performance of contracts to convey, and that it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury and entered into in defiance of a clearly expressed will of the government. We think the latter reasoning correct, and that, whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it."

This language was later quoted with approval by the same learned justice, speaking for the supreme court of the United States in *Anderson v. Carkins*, 135 U. S. 483. It is equally clear that the right of way in question does not fall within the provisions of the amendment to section 2288. The words "canals reservoirs or ditches" are qualified by the words "for irrigation or drainage across it," and it is not claimed or pretended that the ditch in question was for either of these purposes. Furthermore, under its contract the appellant claims not only the right of way, but also the right to divert the water from the homestead claim. Indeed, it is conceded that the water right is the principal element of value in the contract, and a transfer of that right, before final proof, is clearly prohibited by law.

The appellant does not seriously contend that the original contract was valid, but it does contend that the contract was

ratified by a tender of performance and the acceptance of a small payment on the purchase price, after final proof. But, aside from the fact that the tender and acceptance of a payment under the contract are denied, the appellant is here relying upon the original contract and the extension agreement, without which it has no standing in court. It is not out of consideration for the parties that the courts refuse to enforce such a contract as this, but on grounds of public policy, and, so long as the void contract is the basis of the right of action, courts will leave the parties where it finds them. *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404.

The judgment of the court below is therefore affirmed.

MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8800. Department One. July 18, 1910.]

H. H. JAMES, *Respondent*, v. C. E. BEEBE *et al.*, *Appellants*.[1]

CONTRACTS—EXCAVATIONS—CONSTRUCTION—TERMINATION—EXTRA WORK. A clause in a contract for an excavation providing that, if the contractor encounters rock requiring blasting, he agrees to stop excavating and accept proportionate payment, does not render the contract no longer obligatory upon his encountering rock, and authorize him to recover on *quantum meruit* for services thereafter performed, when construed with other provisions of the contract, whereby he first agreed to excavate the lot and remove and clear away all earth and rubbish not requiring blasting, and further agreed to accept proportionate payment for earth removed if rock was encountered, and also agreed to blast and remove rock at $1.25 per cubic yard at the option of the owner; and construing the entire contract together, he was not entitled to extra pay for "preparing and clearing the rock for blasting," since the same was included in the contract.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 10, 1910, upon findings in favor of the plaintiff, after a trial on the merits

[1]Reported in 109 Pac. 1032.

before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

Samuel R. Stern, for appellants.

F. E. Langford, for respondent.

RUDKIN, C. J.—On the 30th day of June, 1909, the plaintiff and the defendant C. E. Beebe entered into the following contract:

"This agreement made this 30th day of June, 1909, by and between C. E. Beebe of the city and county of Spokane, Wash., of the first part, and H. H. James of the said city of Spokane of the second part, Witnesseth: That the said party of the second part covenants and agrees to and with the said party of the first part for the consideration hereinafter mentioned to make an excavation in lot 4, block 48, first add. to Spokane Falls, and clear away all earth, rubbish and rock not requiring blasting from said excavation and to haul same away from the premises.

"Said excavation to be 48 feet wide by 130 feet long beginning at the front of said lot and along the east line of the lot. Same to be graded 48 feet wide and level at and to a depth of 9 feet below the brick sidewalk for a distance towards the alley of 90 feet and extended on from that point 40 feet further towards the alley the same width but only to a depth level with said sidewalk.

"Also to excavate four trenches 90 feet long by 2 ft. wide by 1½ ft. deep where directed by first party in the bottom of the front excavation. The west bank of the main excavations to be sloped back to the lot line at the top to prevent caving.

"Second party is to have the work completed on or before the 21st day of July, 1909, but should he fail so to do then he hereby agrees to pay to the first party the sum of Five dollars ($5) per day as liquidated indebtedness and ascertained damages for each and every day that the work shall remain unfinished after the said 21st day of July, '09, to completion of said excavation same to be deducted from the payment.

"And the said first party covenants and agrees to pay unto the second party for said excavations the sum of four hun-

dred and twenty dollars ($420) on completion of the work if free from all claims for labor of workmen.

"Should second party encounter rock requiring blasting previous to removal he agrees to stop excavating and to accept proportionate payment for his work as the amount of earth, etc., removed may be to the whole specified excavations.

"Should blasting be necessary in making the excavations the second party offers and agrees to blast, break up and remove the rock for the price of $1.25 per cubic yard at the option of the first party.

"Second party shall meet all requirements of the city authorities or ordinances relative to the work and first party shall not be answerable for any damages that may happen by reason of said work."

The complaint alleged the execution of the contract; that the total excavation called for by the contract was 2,390 cubic yards of material, of which 490 cubic yards was rock requiring blasting; that the plaintiff excavated and removed the 1,900 cubic yards of material, other than the 490 cubic yards of rock requiring blasting, and that the proportionate cost thereof under the terms of the contract was $334.25. The complaint further alleged, that after the rock requiring blasting was encountered, the plaintiff, at the special instance and request of the defendants, prepared and cleared the rock on the premises ready for blasting; that the reasonable value of the services so performed was the sum of $250; that no part of said sums has been paid; that the plaintiff prepared and filed his lien claim, etc. The court below found for the plaintiff in the sum of $334.25, for excavating and removing the material other than the rock requiring blasting, and in the further sum of $85.75 for clearing and preparing the ground for blasting, and entered judgment foreclosing the lien, from which this appeal is prosecuted.

The contract provides that "should second party encounter rock requiring blasting previous to removal he agrees to stop excavating and to accept proportionate payment for his work as the amount of earth, etc., removed may be to the

whole specified excavations." Under this provision of the contract the respondent contends that as soon as he encountered rock requiring blasting, in the prosecution of the work, the contract then and there ceased to be obligatory upon him, and that he is entitled to recover the reasonable value of the services thereafter performed in preparing the ground for blasting. When the entire contract is construed together it does not admit of this construction. The respondent first agreed "to make an excavation in lot 4, block 48, first addition to Spokane Falls, and clear away all earth, rubbish and rock not requiring blasting from said excavation and to haul same away from the premises." He further agreed "to accept proportionate payment for his work as the amount of earth etc., removed may be to the whole specified excavations," and to "blast, break up and remove the rock for the price of $1.25 per cubic yard, at the option of the first party." Under these several provisions it was clearly obligatory on the respondent, under the terms of his contract, to excavate and remove all earth, rubbish and rock, excepting rock requiring blasting, for the proportionate part of the contract price. Indeed, this was the construction placed on the contract by the respondent himself, when he presented his bill for $334.25 at the close of the work. We are satisfied that all work performed by the respondent was so performed under the terms of the written contract, that there was no extra work, and no special agreement.

The court below found that the contract was fully performed, except as to the rock requiring blasting, and that work ceased under the contract at the request of the appellants. These findings are supported by competent testimony, and we are not disposed to disturb them. But inasmuch as the recovery is excessive, the judgment must be reversed, with directions to enter judgment in favor of the plaintiff for the sum of $334.25, with interest and costs, and it is so ordered.

GOSE, MORRIS, FULLERTON, and CHADWICK, JJ., concur.

[No. 8378. Department Two. July 21, 1910.]

HENRY TECKLENBURG *et al.*, *Respondents*, v. EVERETT RAILWAY, LIGHT AND WATER COMPANY, *Appellant*.[1]

STREET RAILROADS—COLLISION AT STREET CROSSINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for injuries to horses and a furniture van in a collision with a street car, the negligence of the motorman, and the contributory negligence of the driver of the team, are for the jury, where there was evidence to the effect that the driver of the van, traveling about fifteen feet from and parallel to the track, looked back before attempting to cross the track at a street crossing, and saw no car approaching because he could see back only about half a block on account of the curtains on the van, that the car was approaching from behind at the rate of twenty-five miles an hour, without bell or signal, and not under control, at a street crossing in a well-settled portion of the city where the speed limit was ten miles an hour, and struck one of the horses before the team could be turned back, carrying the horse fifty-five feet and running twenty feet further before it was stopped.

EVIDENCE—OPINIONS—NONEXPERTS—SPEED OF CAR. Nonexpert witnesses, who have an opportunity for observation in the case at hand, may give their opinions as to the rate of speed at which a street car approached a street crossing and collided with a team.

APPEAL AND ERROR—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE—SUFFICIENCY. In an action against a street car company for injuries to a team, struck by a car traveling in a city street at the rate of twenty-five miles an hour, in which the defendant street car company admitted ownership of the franchise under which the complaint alleged it was operating, an objection as irrelevant and immaterial, upon plaintiff's offer of a certain ordinance "as the franchise ordinance of the defendant company," to show the speed limit, does not raise the objection that the ordinance offered granted a franchise to another company, its successors and assigns, and not to the defendant company; since the objection should have been specific so that the plaintiff could have offered evidence to identify the franchise as the one under which defendant was operating.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requests for instructions covered by the instructions given.

[1]Reported in 109 Pac. 1036.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 29, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Affirmed.

Brownell & Coleman, for appellant.

Bell, Anderson & McLaren, for respondents.

Crow, J.—This action was commenced by Henry Tecklenburg and G. G. Gabrielson, copartners doing business under the firm name and style of Northern Transfer Company, against Everett Railway Light and Water Company, a corporation, to recover damages for injuries to a team and loaded van. From a judgment in their favor, the defendant has appealed.

The appellant owns and operates an electric railway on Broadway and other streets in the city of Everett. The respondents are engaged in the transfer business. On February 16, 1909, Lowell Giggey, their employee, was driving one of their teams and a loaded van. As he was about to cross appellant's railway track at the intersection of Broadway and Thirty-seventh streets, one of the appellant's cars, traveling on Broadway in the same direction in which Giggey had been driving, overtook and collided with the team, killing one of the horses, and injuring the van and its contents. Respondents alleged appellant's negligence in the following language:

"That as plaintiff's said employee had reached said crossing, defendant negligently and carelessly ran one of its street cars up to, upon and across said crossing of Broadway and 37th street at a high and dangerous rate of speed, exceeding ten miles an hour, and negligently and carelessly omitted, while so approaching said crossing, to give any signal by ringing a bell or sounding a whistle, and negligently and carelessly omitted to have said car under control.

"That solely by reason of defendant's negligence, said street car struck plaintiffs' horses and killed one of them immediately; and also struck plaintiffs' van, breaking it and

the harness to pieces; and also broke and injured the furniture and household goods in said van."

Appellant by its answer admitted that it was the owner of the franchise and street railway, denied negligence on its part, and affirmatively pleaded contributory negligence. Respondents' witnesses testified that Giggey was slowly traveling on Broadway, parallel with and about fifteen feet from the railway track; that before he attempted to cross at the intersection of Thirty-seventh street, he looked north and south along Broadway to see whether any car was approaching; that by reason of curtains on the van he could see only half a block, or about two hundred and forty feet; that he neither saw nor heard any car; that he then endeavored to turn his horses across the railway; that just as the fore feet of the horses were in the center of the track, he heard an approaching car; that he immediately attempted to turn back from the track; that before he succeeded in doing so, the car struck; that one horse, weighing about fifteen hundred pounds, was killed and carried about fifty-five feet; that the car ran about twenty feet further; that it was moving at the high rate of speed of twenty-five miles an hour or more; that no whistle was sounded; that no bell was rung; that Giggey did not know of the approach of the car until it was nearly upon him; that the motorman did not have it under control, and that the accident occurred at a street crossing in a well-settled portion of the city. Much of this evidence was disputed. Appellant's witnesses testified that Giggey was traveling ahead of the car about four feet from the track; that the car was running from seven to twelve miles per hour; that the motorman rang the bell; that Giggey unexpectedly turned across the track when only sixty feet ahead of the car, and that the motorman applied the emergency brake, reversed the car, and stopped as quickly as possible.

Appellant first contends that the trial court erred in denying its challenge to the sufficiency of the evidence and in refusing its motion for a directed verdict. From the brief

statement of the conflicting evidence above set forth, it is manifest that the challenge and the motion were properly denied. Appellant insists that Giggey was guilty of contributory negligence in suddenly and unexpectedly attempting to cross the track immediately in front of the approaching car. The evidence of respondents' witnesses, which must have been accepted by the jury, was sufficient to sustain their finding that Giggey was exercising ordinary caution, that he did look, that he attempted to cross at the intersection of Thirty-seventh street, and that appellant's car was running at a reckless and dangerous rate of speed. A motorman seeing a team driving ahead of his car in the same direction he is traveling and parallel with the track, might be justified in assuming that the teamster would not attempt to cross the track at other points than street crossings, but he would not be justified in assuming that the driver would not cross when he reached the intersection of another street where it might become necessary for him to change his course of travel. There was sufficient evidence to sustain the jury in finding negligence on the part of the appellant, and we would not be justified in holding that the respondents' servant, Giggey, was, as a matter of law, guilty of such contributory negligence as to preclude a recovery in this action. The issues of negligence and contributory negligence were for the jury. *Henry v. Seattle Elec. Co.*, 55 Wash. 444, 104 Pac. 776; *Keefe v. Seattle Elec. Co.*, 55 Wash. 448, 104 Pac. 774; *Wilson v. Seattle, Renton & Southern R. Co.*, 55 Wash. 651, 104 Pac. 1112.

Appellant further contends that the trial court erred in permitting respondents' witnesses to testify to the speed of the car at the time of the collision, and in support of such contention makes the following quotation from *Mathieson v. Omaha St. R. Co.*, 3 Neb. (Unof.) 743, 92 N. W. 639:

"It is conceded that a witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street cars, but he must be shown to have had, and to have availed himself

of, an opportunity for observation in the case in hand."

The witnesses resided in the city of Everett, were acquainted with the locality, the street, and the railway, had frequently noticed cars running thereon, saw this particular car at the time of the accident, had an opportunity for observation in the case in hand, and, under the rule announced in the citation, were qualified to state their opinion. A witness who has observed an occurrence may state his opinion with reference thereto when the occurrence is of such a nature that he cannot reproduce and describe it to the jury exactly as it appeared to him at the time. This court, in *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, said:

"It is a general rule of evidence that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine. But this rule is not without exception. And the exception is not confined to the evidence of experts who may give opinions on questions requiring special skill, knowledge or learning, but includes the evidence of common observers who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time. . . . The witness in this case expressed his opinion as a conclusion of fact based upon the observation made by him, at the time of the accident, as to the rate of speed of the car and the exertions made by the motorman to stop it; and it seems to us that the testimony is clearly embraced within the rule above stated."

Appellant further contends that the trial court erred in admitting in evidence a certified copy of an ordinance entitled, "An ordinance granting to Everett Railway and Electric Company, its successors and assigns, a franchise to build and operate street railways in the city of Everett, Snohomish county, Washington," section 6 of which contained a speed limit of ten miles per hour. Appellant now calls attention to the fact that the franchise was granted to the Everett Railway and Electric Company, which is not the defendant company in this action, and that there is no evidence to iden-

tify them. This objection cannot be sustained, being made for the first time in this court. The complaint alleged, and the answer admitted, appellant's ownership of the franchise under which the railway in question is operated. When the ordinance was offered, respondents' attorney said: "We offer in evidence plaintiffs' exhibit D, being a certified copy of Ordinance No. 130, *which is the franchise ordinance of the defendant company*, for the purpose of showing the limit of speed that it is entitled to operate thereunder, under their franchise." To this offer the appellant's attorney said: "I object to it, on the ground that it is irrelevant and immaterial." No other objection was made, nor was attention called to the fact that the corporation named in the franchise was not the defendant corporation or its assignor. If the ordinance was not the one under which the appellant owned and operated its street car system, attention should have been called to that fact at the time of the offer, and respondents, if they could have done so, would have offered evidence to identify the franchise as the one under which the appellant is operating its line. When objections to evidence are not sufficiently definite to call the attention of the trial court to the particular ground upon which they are based, error cannot be successfully predicated thereon.

Appellant further contends that the trial court erred in refusing certain instructions requested, and in instructions given. The points involved in the instructions requested are covered by other instructions given. We are unable to find any error in the instructions given.

The judgment is affirmed.

Rudkin, C. J., Dunbar, Mount, and Parker, JJ., concur.

[No. 8777. Department One. July 22, 1910.]

ANDREW HACKETT, *Respondent*, v. GEORGE SCOTT *et al.*, *Appellants*, CARBON HILL COAL & COKE COMPANY, *Defendant*.[1]

WITNESSES — IMPEACHING OWN WITNESS — DISCRETION OF COURT. Where a witness was proceeding under a misunderstanding, or counsel had been misled or deceived as to what the witness would testify to, it is proper to allow counsel to ask whether the witness had not made contradictory statements at other times or places, thereby leading or tending to impeach the witness; and in no case should it be held prejudicial unless the court clearly abused its discretion.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error in the admission or rejection of evidence in a case tried to the court is harmless where it can be disregarded without affecting the result.

APPEAL—REVIEW—FINDINGS. Findings upon flatly conflicting evidence, depending on the credibility of witnesses produced before the trial judge, should be sustained on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 29, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for the dissolution of a partnership and for an accounting. Affirmed.

Burcham & Blair, for appellants.

Nuzum & Nuzum and *Graves, Kizer & Graves*, for respondent.

CHADWICK, J.—This action was brought by respondent to recover an interest in a certain number of shares of stock in the Carbon Hill Coal & Coke Company. It is alleged that, in the month of January, 1907, respondent and appellants caused certain coal claims to be located in the province of Alberta, Canada; that at the time of filing, it was agreed between them that the lands and the profits arising from their sale or transfer were to be owned or shared equally by the

[1]Reported in 109 Pac. 1030.

three parties; that the lands, after some preliminary manipulation, were taken over by the Carbon Hill Coal & Coke Company; that appellants, in fraud of the rights of respondent, have appropriated the whole of the stock issued on account of the locators, or rather the original parties who caused the locations to be made; that there has been no accounting, and that the stock so issued is now in pool in the office of the Carbon Hill Company. All of these allegations are denied by the appellants, who assert a sole ownership to the stock issued to them as owners of the land. The court found with the respondent upon all the disputed issues of fact, and from a decree in his favor, appellants have appealed.

One Mr. Appelquist, one of the organizers of the Carbon Hill Company, was sworn as a witness on behalf of respondent. Being interrogated as to a conversation held in his office in which he, appellant, and respondent Scott had engaged, and whether at that time Scott said "anything either negativing or agreeing that Hackett was in on those properties—did he say that he—was or wasn't in on it?" he replied, "No, he didn't explicitly state that at that time." He afterwards said, "In the February conversation? I don't remember whether Mr. Scott was present at that time." Whereupon counsel for appellants moved to strike his testimony as to what appellant had said in the office of the witness. The ruling of the court and the colloquy it induced follow:

"Mr. Graves: With the permission of the court I would like to ask this witness a question or two—I talked with this witness in my office. The Court: The court has no objection. Q. (by Mr. Graves) Now Mr. Appelquist, did you not tell me in my office that Mr. Scott and Mr. Hackett were present in your office at this conversation when Mr. Hackett said that he was interested and Mathewson and Scott were with him in these what are at present the Carbon Hill properties? Mr. Burcham: Object to the question because it is impeaching and contradicting his own witnesses, and above all that it is leading to the highest degree and in the most objectionable sense; the witness has stated positively and specifically on this point that he doesn't remember that Mr. Scott

was present. The Court: Overruled. Exception. A. Yes, I was in your office, Mr. Graves, the other day, and you sent for me to come up— Mr. Burcham: I move to strike all that as immaterial and irrelevant. The witness (continuing): and the question was brought up in relation to Mr. Hackett being present, and Mr. Scott, at our office during the month of June or May, 1907—at that time the proposition was gone into about the South Fork properties—and I believed from the conversation that was carried on there that Mr. Hackett and Mr. Scott were interested together in those properties. Q. Didn't you state to me distinctly that they were both present when Mr. Hackett said he was interested and that Scott agreed to that, or words in substance the same?—Of course you didn't undertake to repeat the exact words he said, but that was substantially what he said? Mr. Burcham: I renew the objection. A. Well, substantially to that effect. Mr. Burcham: I renew the objection. The Court: Objection overruled. Exception. Q. What is that? A. Yes, I think that that was the sum and substance of it. Q. Well, that is a fact, isn't it? A. Yes. Q. What you told me in the office? A. Yes, that is as near as I can remember from both conversations."

This is assigned as error. But we are unable to follow counsel in his reasoning. Aside from the fact that there were apparently two conversations, one in February and another in May or June, and that the witness was proceeding upon a misunderstanding which counsel would have a perfect right to correct, we do not understand that the rule invoked by appellant would go so far as to preclude a party from meeting and correcting testimony when he has been misled or deceived, or when, under a mistaken notion of what the witness will testify to, he has advanced him as a witness. The object of all trials should be to elicit the truth, and while the cross-examination or impeachment of one's own witness should be extended only under the direction or permission of the court, it should in no case be held to be prejudicial error unless it is clear that the court has abused its discretion. The rule is laid down in 10 Ency. Plead. & Prac., 318. See, also, Wigmore, Evidence, 875-918, where the rationale of the law is

discussed with reference to the authorities. In *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414, this court said:

"The better rule undoubtedly is, that a party who has been surprised at the unfavorable testimony of a witness he has called in his own behalf, may ask such witness whether he has not made contradictory statements at other times and places, and if the witness denies it, show by other evidence that he has made such statements; and in this case it would have been proper to have permitted the witness to answer the questions to which objections were made."

Other errors going to the admission or rejection of evidence are assigned, but inasmuch as the case was tried by the court without a jury, and the errors complained of can be wholly disregarded without affecting the result of our judgment, we shall not discuss them. *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605. With these exceptions, only questions of fact are discussed. The evidence is flatly contradictory. Each side insists upon the falsehood of the other, and makes generous offerings from the testimony to prove its premises. To analyze the conflicting testimony would be unprofitable, for an examination of the record convinces us that the trial judge, whose opportunity to measure the witnesses was greater than our own, did not err when he held at the conclusion of the trial, that "Mr. Hackett's story is one which appeals more to the reason of a person listening to it than that of either Mr. Scott or Mr. Mathewson." In such cases it has been the practice of this court to follow the trial judge. *Notaro v. Douglas*, 55 Wash. 493, 104 Pac. 774; *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620, 101 Pac. 233; *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727; *Dietrich v. Pederson*, 51 Wash. 191, 98 Pac. 611; *Duteau v. Barto*, 48 Wash. 207, 93 Pac. 220.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8818. Department One. July 22, 1910.]

GORMAN & COMPANY, *Appellant*, v. W. M. ANDREWS *et al.*, *Respondents*.[1]

FISH—LICENSES—LOCATIONS—ABANDONMENT—FISHING SEASON—STATUTES—CONSTRUCTION. Under the general act, applying to all the waters of the state, providing that a salmon fishing license for one year from April 1 shall be deemed abandoned if, during the "fishing season" covered by the license, the locator fails to construct his appliances, the term "fishing season" applies only to waters where there is a regular fishing season, as on the Columbia river, and locations in Puget Sound are not abandoned upon failure to construct appliances during the summer and fall runs, since salmon abound in Puget Sound at all times of the year, and there is no distinct fishing season within the meaning of the act; and an involuntary abandonment could not be worked during the life of the license. (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered January 17, 1910, upon findings in favor of the defendants, in an action to enjoin the use of a fish trap location, after a trial on the merits before the court. Reversed.

Kerr & McCord and *Dorr & Hadley*, for appellant.

A. W. Buddress, for respondents.

CHADWICK, J.—Plaintiff is the successor in interest of the Washington Packing Company, the original locator of a trap site for fishing in San Juan county. The Washington Packing Company fished the ground for the years 1906 and 1907, but although its license was renewed on April 1, 1908, it made no improvements, nor did it fish the ground during that year. On December 26, 1908, the Washington Company sold its possessory rights and assigned its license to plaintiff, which caused a resurvey of the premises to be made and refiled a location map made from the actual survey. On April 1, 1909, plaintiff's annual pound net fishing license was renewed

[1]Reported in 109 Pac. 1033.

by the fish commissioner of the state. Some time in December, 1908, defendant W. M. Andrews located the ground formerly occupied by the Washington Packing Company, as a fish trap site, taking out a license therefor which, by its terms and under the statute, would expire on the 31st day of March, 1909. This license was renewed April 1, 1909. In so far as surveys and filing maps are concerned, we believe that the defendant Andrews sufficiently complied with the law, although his acts in that regard are challenged by plaintiff. It will thus be seen that there are two locations and two licenses out for the same ground.

On March 28, defendant Sims, the lessee of defendant Andrews, commenced the construction of a fish trap on the disputed ground, and before the first day of May, 1909, had constructed a pound net fish trap at considerable expense. During the month of June, 1909, plaintiff constructed a pound net or fish trap on the disputed ground, and occupied the same during the balance of the fishing season. This action was begun by plaintiff to enjoin defendants from continuing their operations in the way of fishing or constructing or maintaining any fishing appliances or traps upon the disputed ground, and for general relief. The court found that the Washington Packing Company had abandoned the ground and its rights therein by reason of nonuser during the "fishing season" of the year 1908, and that it had no transferable interest, and that the appliances of plaintiff constituted an unlawful obstruction of defendants' rights in the disputed grounds; and enjoined plaintiff from "in any manner maintaining or operating a fish trap on said fishing location." From this decree, plaintiff has appealed.

The court found "that during all the times herein mentioned the said fishing location has been valuable for only spring, summer and fall fishing of salmon, being from about the 1st day of May to the 1st day of November of each year, and that the fishing season for said location would end on or about the 1st day of November of each year." It is the con-

tention of the respondent, and was the view of the trial judge, that the license issuing under the law on April 1 in each year did not carry any right in the fishing location over the actual fishing season, or the two marked runs of salmon, called by the court summer and fall fishing; that the season thus ending on November 1 each year, appellant had no rights in the ground, because of the failure of its assignor to erect its appliances during the summer and fall of 1908. On the other hand, appellant contends that the Puget Sound fishing season and license year are synonymous, and that an involuntary abandonment could not be worked within the term of the license.

The two questions upon which the rights of the parties must depend, that is, the meaning of the term "fishing season" as applied to the waters of Puget Sound, and the duration of a licensee's rights, have been met by former decisions of this court. In *State ex rel. Curry v. Crawford*, 14 Wash. 373, 44 Pac. 876, it was contended that the fishing season is confined to certain months in the year. The court said:

"It is conceded that as to the Columbia river there is a fishing season as contended for by the respondent, but not so as to Puget Sound, and it is a well-known fact that salmon abound there at all seasons of the year, and fishing for them is not confined to any particular time."

In *Legoe v. Chicago Fishing Co.*, 24 Wash. 175, 64 Pac. 141, the fishing acts, Laws 1893, p. 15, and Laws 1897, p. 214, were under consideration. After saying that the evident intention of the legislature in passing the acts in question was to grant to the license holder an exclusive right to the particular ground where he constructed, or indicated his intention to construct, the fixed appliances authorized for a limited time, extending at most not longer than the date of the expiration of the license, the court said:

"The act was general, and applied to all the public waters over which the state had jurisdiction. In some of these waters at least, if not in all of them, there is a regular fish-

ing season, confined to certain months of the year, which, while varying slightly with the different years, recurs with substantial regularity. The license authorized by the act ran for one year. It was issued at and bore date from the time application was made for it, regardless of the actual fishing season. It would seem from this that the legislature intended by the clause of the statute in question to fix the end of the actual fishing season, instead of the date of the expiration of the license, as the limit of time for which an indicated location could be held without the construction of a fishing appliance."

It is upon this case that counsel for respondent principally relies, and it no doubt moved the trial court to enter the decree that he did. Since the rendition of the decree in the *Legoe* case, the exact question has been before this court, and it has been held that no rights accrued to a locator who had made a location in the waters of Puget Sound in January, 1909, the ground being at the time under a license to another expiring March 31, 1909, neither party having made any improvements during the summer and fall runs, as was the case here. *Muller v. Apex Fishing Co.*, 57 Wash. 140, 106 Pac. 625. By the terms of section 2 of the act of 1905, Laws 1905, p. 255 (Rem. & Bal. Code, § 5214), the original licensee or its transferee had the right to renew its license. This being done in this case, it follows that the case should be reversed, with instructions to the trial court to enter a decree in favor of appellant. The last legislature, chapter 77, section 3, Laws of 1909, page 146 (Rem. & Bal. Code, § 5212), provided:

"If the locator or owner of a fishing location for pound nets or fish traps in the waters of Puget Sound fails to construct his fishing appliances thereon at least one time during a period of four years, his location shall be deemed abandoned, even though he shall during said period comply with the requirements of the laws of the state of Washington pertaining to fishing locations in other respects. Any statute of the state of Washington inconsistent with the provisions of this section is hereby repealed."

It is likely, although it is not necessary to so decide, that this statute saves the rights of appellant, irrespective of the reasons hereinbefore assigned.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

FULLERTON, J., dissents.

[No. 8833. Department One. July 22, 1910.]

INTERNATIONAL DEVELOPMENT COMPANY, *Appellant*, v. W. R. CLEMANS *et al.*, *Respondents*.[1]

COVENANTS—AGAINST INCUMBRANCES—BREACH—DAMAGES. A covenant of warranty against incumbrances is one of indemnity and only nominal damages can be recovered for a breach, where the plaintiff fails to allege either an eviction or a discharge of the incumbrances.

PLEADINGS—AMENDMENTS—DAMAGES—ARISING AFTER ACTION. Usually, for the recovery of damages occurring after the commencement of an action, the plaintiff should file an amended or supplemental complaint.

SAME—DISCRETION OF COURT. It is not an abuse of discretion to refuse leave to file an amended or supplemental complaint to show damages occurring after the commencement of an action for breach of covenant, where the plaintiff had attached defendant's property when it had no substantial right of action and did not ask leave to amend until after the court had charged the jury at the close of the trial.

SAME—AMENDMENTS TO CONFORM TO PROOF. A complaint should not be deemed amended to conform to the proof, so as to permit a recovery outside of the allegations of the complaint, where the proof was objected to, and in amending it the court expressly restricted it to another proper purpose because such recovery was not sought in the complaint.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Sullivan, J., entered November 12, 1909, upon the verdict of a jury rendered in favor of the plaintiff for nominal damages by direction of the court, in an action for breach of covenant. Affirmed.

[1]Reported in 109 Pac. 1034.

Danson & Williams, for appellant.

Forney & Moore and *Samuel R. Stern*, for respondents.

RUDKIN, C. J.—This was an action to recover damages for breach of the covenants of warranty contained in a certain deed executed by E. M. Sharon and wife, as grantors, in favor of the plaintiff herein, as grantee, for certain land in Adams county, in this state. While the deed was executed by E. M. Sharon and wife, the complaint alleged that the Sharons held the title to the property as agents for the defendants, who were the real principals in the transaction and received the entire consideration for the conveyance. The deed contained a covenant of title and also a covenant against encumbrances, except a mortgage on the land in favor of the Northwestern & Pacific Hypotheekbank in the sum of $4,800, and a mortgage in favor of one Flood in the sum of $3,000. The land was in fact subject to numerous other encumbrances, including a quitclaim deed executed by a former owner to the Bank of Lind, to secure certain indebtedness to the bank, upon which an action of foreclosure was pending at the time of the commencement of the present action. The complaint alleged a demand upon the defendants to satisfy and discharge the encumbrances against the property, but failed to allege either an eviction or a discharge of any of the encumbrances by the plaintiff.

At the close of the testimony, the court charged the jury that if they found in favor of the plaintiff they should award nominal damages only, and that by nominal damages was meant $1 or less. The plaintiff thereupon asked leave to file an amended or supplemental complaint for the purpose of showing that a judgment of foreclosure had been entered in the action prosecuted by the Bank of Lind; that the property had been sold on execution and bought in by the bank, and that the bank had entered into possession of the property, all of which occurred since the commencement of the present action. Leave to file the amended or supplemental complaint

was denied, and the jury returned a verdict in favor of the plaintiff for nominal damages. From a judgment on this verdict, the plaintiff has appealed, and the following questions are presented for the consideration of this court.

First, in view of the failure of the complaint to allege either an eviction or a discharge of the encumbrances against the property by the appellant, did the court err in charging the jury that the appellant was entitled to recover nominal damages only; second, did the court err in refusing leave to file an amended or supplemental complaint; and third, did the court err in refusing to consider the complaint amended to conform to the proof, which tended to show that, since the commencement of this action, the property had been sold on execution, and that the purchaser at the sale had entered into possession?

(1) In discussing the measure of damages for breach of a covenant against encumbrances, in 2 Devlin on Deeds (2d ed.), § 916, the author says:

"This covenant is considered to be one of indemnity. If the covenantee has not removed the encumbrance, it may be that he will never be disturbed by it. He may discharge the encumbrance, but if he does not do so the universal rule is that while it remains undischarged and he has suffered no actual injury, he is entitled to only nominal damages."

Sutherland says: "This is the settled American rule." 2 Sutherland, Damages (3d ed.), § 622.
See, also, 11 Cyc. 1165; *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496.

The reason generally assigned is that if the covenantee has not extinguished the encumbrance it is still outstanding, and may be asserted and enforced against the person personally liable, and if the covenantee were permitted to recover substantial damages, and the encumbrance was thereafter discharged by another, the covenantee would recover damages which he never sustained. We are satisfied with this rule and the reasons upon which it is founded. The appellant suggests that the encumbrances here involved were not personal charges

against the respondents, but if they were not they are personal charges against some other person and the reason for the rule still applies. The instruction complained of is supported by well-nigh universal authority and is free from error.

(2) "The assessment of damages is usually governed by the situation or condition of affairs existing at the time the action is brought; hence for a recovery of loss or damages occurring thereafter plaintiff should amend or file a supplementary petition." 13 Cyc. 177.

Amendments should be liberally allowed in furtherance of justice and to prevent a multiplicity of suits, but nevertheless applications for leave to file amended or supplemental complaints are addressed to the sound discretion of the trial court, and its ruling will not be reversed on appeal unless a manifest abuse is shown. In the present case the appellant instituted its action and attached the property of the respondents at a time when it had no substantial right of action against them, and the application for leave to amend was not made until after the court had charged the jury at the close of the trial. In view of these facts, it cannot be said that the court below abused the broad discretion vested in it by law.

(3) A recovery on testimony without the allegations of the complaint is only warranted where the testimony is received without objection. In this case the trial court ruled repeatedly during the trial that testimony tending to show a foreclosure of the quitclaim deed to the Bank of Lind was only admitted for the purpose of showing the existence of a lien or encumbrance. Thus, on page 275 of the transcript, the court said: "This judgment was only admitted to show that a lien existed, there is nothing in the complaint about it being foreclosed." Again, on the same page, the court said: "I say it is admitted for that purpose and no other, simply to show the lien against it, I do not want any dispute about these matters. The answer admits these liens are against it." Under such circumstances the complaint should not be deemed

amended to conform to the proofs, for the purpose of authorizing a recovery outside of the allegations of the complaint. These are the principal objections urged against the judgment below, and finding no error in the record, that judgment is affirmed.

FULLERTON, GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8536. Department One. July 23, 1910.]

TWYMAN O. ABBOTT, *Appellant*, v. CRAWFORD & CONOVER, *Respondent*.[1]

BROKERS—LIABILITY—RECOVERY OF EARNEST MONEY—FACT OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. In an action to recover earnest money paid on an intended purchase of land, the preponderance of the evidence shows that plaintiff dealt with the defendant as an agent or broker, and not as the principal, and defendant is not liable for the earnest money where it appears that the defendant, a corporation engaged in the real estate business, a day or two after application by the plaintiff for tide lands, submitted a proposition on property belonging to one C., whom two witnesses testified was present at plaintiff's office with defendant's employee, that plaintiff, who was a lawyer, drew his check for $700 payable to the defendant, and insisted upon two receipts, which he drew up, one being from C. to the defendant for $500 earnest money, $200 being the amount of defendant's commissions retained by it, and that four days later, at defendant's office, plaintiff met C., as he claims for the first time, and objected to the contract of sale because C. was a married man and the contract was not signed by C.'s wife, and not because the contract was not signed by the defendant; since the recitation in the receipt that C. had received the $500 from the defendant must be construed in the light of the whole transaction, and the other circumstances bear the scale in favor of the respondent (GOSE, J., dissenting).

Appeal from a judgment of the superior court for King county, Gay, J., entered April 30, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 109 Pac. 1063.

Philip Tindall, for appellant.

James B. Howe, *C. H. Farrell*, and *Peter L. Pratt*, for respondent.

PER CURIAM.—Plaintiff called on defendant, a corporation engaged in the real estate business in Seattle, Washington, in the early part of January, 1906, with reference to the prospective purchase of tide lands in that city. Defendant at the time had nothing to offer, but a day or two after, one of its employees called upon plaintiff and submitted two propositions, one of which seemed attractive to him. On January 11, plaintiff drew his check upon a local bank for the sum of $700, payable to defendant. The property was owned by one W. L. Clark, but plaintiff contends that he did not know that any one other than defendant was interested in the transaction directly or indirectly, at the time the $700 was paid, nor for several days thereafter. Two witnesses on behalf of defendant swore that Mr. Clark was present at the time the $700 was paid. Their testimony is supported by the fact that a receipt for $500, of even date with the check, drawn by Mr. Abbott himself, is signed by Clark. Defendant's witnesses testified that plaintiff insisted upon having the receipt in proper form and he, being an attorney, was asked by Mr. Conover, a member of the defendant company, to draw it himself, so that its terms might be stated in accord with his ideas. The receipt runs to Crawford & Conover.

Thereafter, on January 15, plaintiff was notified that the matter had so far progressed that it had been put in the form of a contract, which was ready for delivery. Plaintiff then went to the office of the defendant and there met the owner, as he says, for the first time, and looked over the contract. He says:

"I discovered that it was executed only by himself [Clark]. I asked him if he was a married man, and upon his stating that he was, I handed back the paper without any further examination, and informed them that I would not accept it

until it had been properly executed by his wife." An abstract of the title was delivered to appellant at that time, and at the same time, Crawford & Conover signed a memorandum reciting the receipt of the contract from Clark to plaintiff, and other papers to be delivered upon approval of abstract and payment of the purchase price. It further recited that, if the payments were not made in accordance with the contract, the papers should be returned to Clark. Plaintiff disclaims any notice or knowledge of this memorandum. Within five days allowed for the examination, appellant returned the abstract with certain objections. He declined to proceed further, and demanded a return of the earnest money from defendant. It is the contention of plaintiff that he dealt only with defendant, and purposely avoided contracting in any way with Clark; while defendant contends that it acted solely as an agent or broker, that it had no interest in the property or the transaction, other than its commission of $200, which Clark paid out of the $700 received as an initial payment, all of which was known to plaintiff at the time. From a judgment in favor of the defendant, plaintiff has appealed.

Whether respondent dealt with appellant as an agent or a principal, was the only question considered by the lower court, and the only one for us to decide. That appellant had notice of Clark's ownership and drew the receipt for the amount of the earnest money going to him, and that his objection to the form of the contract when submitted was based, not upon the fact that it was not signed by respondent with whom he insists he intended to deal as a principal, but upon the fact that Clark, the owner, was a married man, and that his wife had not joined her husband in its execution, are circumstances sufficient to bear the scale in favor of respondent. The fact that the earnest money receipt recited that Clark had received $500 from respondent, must be construed in the light of the whole transaction. When so considered, it would not show title in, or intent to take title by, respondent.

The evidence preponderating in favor of respondent, the judgment of the lower court was properly entered. Judgment affirmed.

GOSE, J. (dissenting)—As I read the evidence, the conclusion is forced upon me that the appellant dealt exclusively with the respondent. He paid it the sum of $700 earnest money. It retained $200, and paid Clark, the alleged owner of the property, the balance, and took his receipt therefor, reciting that he had received $500 from the respondent as earnest money for the purchase price of the property described in the receipt. If the appellant had dealt with Clark, as the respondent claims, he would have paid the money to him and would have taken the receipt in his own name. The appellant is not mentioned in the receipt. The title to the property not being marketable, the appellant was entitled to have the earnest money returned by the respondent. The judgment should be reversed, with directions to enter a judgment in favor of appellant for the amount claimed.

[No. 8736. Department Two. July 23, 1910.]

H. R. DICKERMAN, *Plaintiff and Appellant*, v. W. C. REEDER *et al.*, *Defendants and Appellants*, CRAB CREEK LUMBER COMPANY, *Intervener*.[1]

MECHANICS' LIENS—FORECLOSURE—ANSWER—BUILDING CONTRACTS STIPULATED DAMAGES. An answer in an action to foreclose a mechanics' lien, setting up the affirmative defense of stipulated damages for delay under "the contract" to complete "the building," is not demurrable for failure to set out the contract and more specifically describe the building, where the substance of the contract was stated.

APPEAL—REVIEW—PLEADING—HARMLESS ERROR. It is not reversible error to overrule a demurrer to an indefinite or uncertain pleading.

[1]Reported in 109 Pac. 1060.

EVIDENCE—CONTRACTS—SPECIFICATIONS REFERRED TO — ADMISSIBILITY. In an action upon a building contract which expressly made the plans and specifications a part thereof, although not attached, a copy identified as one of the original plans and specifications is properly admitted in evidence.

DAMAGES—STIPULATED DAMAGES—DELAY. A contract for stipulated damages of five dollars per day for delay in the completion of a building is enforcible.

CONTRACTS—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE—ISSUANCE—WAIVER OF OBJECTIONS. In an action on a building contract, an architect's final certificate of the completion of the building is properly admitted in evidence against the contractor, where, after cutting down the contractor's bill for extras, the certificate was issued showing the completion of the building and the amount due, and was delivered by the architect to a third person to be delivered to the contractor when he should accept the allowance for extras, and thereafter the contractor did not seek arbitration as required by the contract in case of any dispute as to the amount allowed for alterations, since he thereby waived any objection to the allowance for extras and accepted the same.

SAME — CONCLUSIVENESS — ARCHITECT'S CERTIFICATE — WAIVER. Where it is not claimed that an architect acted arbitrarily or fraudulently, it is error to allow in full a contractor's claim for extras, where the final certificate of the architect, made a prerequisite to an action on the building contract, cut down the amount claimed by the contractor, and the contractor waived objection to the allowance by failing to seek arbitration as required by the contract in case of any dispute.

Cross-appeals from a judgment of the superior court for Adams county, Holcomb, J., entered November 19, 1909, upon findings in favor of the plaintiff and intervener, in an action to foreclose a mechanics' lien, after a trial on the merits before the court without a jury. Affirmed on plaintiff's appeal, and reversed on defendants' appeal.

W. W. Zent and *John M. Cannon*, for plaintiff and appellant.

Lovell & Davis, for defendants and respondents.

MOUNT, J.—Plaintiff brought this action to foreclose a mechanics' lien, for the amount due him as contractor for the construction of a building at Ralston, in Adams county. The

Crab Creek Lumber Company intervened in the action, and sought to foreclose a lien for material furnished to the contractor. The defendants Reeder and Lucy, owners of the building, defended by making certain denials and alleging counterclaims for damages. The lower court found upon the trial that there was due the plaintiff upon the contract $987.30, but deducted therefrom $550 as liquidated damages, and entered a decree of foreclosure for the balance, with interests, costs and attorney's fees; and also entered a decree in favor of the Crab Creek Lumber Company for the amount of its claim. The plaintiff has appealed, claiming that the court erred in overruling the demurrers to defendants' counterclaim for damages; also, in admitting in evidence a copy of the plans and specifications, and also in allowing damages in the sum of $5 per day for delay beyond the specified time for completing the building. The defendants Lucy and Reeder have filed a cross-appeal, claiming that the court erred in receiving in evidence the architect's final certificate. Neither appeal affects the decree in favor of the intervener. The appellant and respondents will be designated in this opinion as plaintiff and defendants, respectively.

The plaintiff first argues that the court erred in overruling the demurrers to the affirmative defenses which set up counterclaims. The answer of the defendants, after admitting the contract alleged in the complaint and making certain general denials, alleged as an affirmative defense by way of counterclaim, as follows:

"That in the contract entered into between plaintiff and defendants it was agreed that he would complete the building and deliver the same to the defendants on or before December 1, 1908, and in case of failure to deliver the said building the said plaintiff agreed to pay stipulated damages in the sum of $5 per day, and on the 15th day of April, 1909, the date of bringing this action the said building had not been finished or delivered as per the contract, and by reason thereof the plaintiff is indebted to these defendants in the sum of $600."

If we understand the plaintiff's argument, it is to the effect that, because the words "the contract" and "the building" are used without setting out the contract or more specifically stating what building is referred to, the separate answer is in itself incomplete and therefore insufficient. We think the separate answer is sufficiently complete within itself, for it states the substance of the contract. But if it is indefinite or uncertain, the overruling of a demurrer would not necessarily be reversible error.

It is next argued that the court erred in receiving in evidence a copy of the plans and specifications. There is no merit in this contention, for the copy offered in evidence was identified as the specifications referred to in the contract. None were attached to the contract set up in the complaint, although the plans and specifications were made a part thereof by express reference thereto, and it is not claimed that the copy offered was not correct. The evidence is sufficient to show that the copy offered is one of the originals.

It is next argued that the court erred in deducting $550 as stipulated damages, for delay in completing the building after the period provided for in the contract, being one hundred and ten days at $5 per day. Such contracts have frequently been enforced by this court. See, *Jenkins v. American Surety Co.*, 45 Wash. 573, 88 Pac. 1112, and cases there cited. There is, therefore, no merit in the plaintiff's appeal.

On the appeal of the defendants, it is argued that the court erred in receiving in evidence the final certificate of the architect, to the effect that the final payment was due. It appears that a bill for extras, amounting to $521.15, had been presented by the contractor to the architect for approval. The architect approved certain items amounting to $326.45, and rejected the other items for extras. The architect also made deductions for imperfect work and work not done according to the contract, in the sum of $183, which amount was also deducted from the claim allowed for extras, thus

reducing the amount allowed for extras to $143.45. Following these allowances and deductions, it was stated: "The architect will accept the building when the contractor accepts this bill." Copies were delivered to the contractor and to the owners. On the same day the architect issued and attached to the allowance for extras as above stated his final certificates that the building was completed and that the contractor was entitled to final payment of $3,775 "less amount paid to Mr. G. G. Evans for plastering, together with bill for extras, amounting to $143.45." This certificate was not delivered to the contractor, but was left by the architect with one Clodius, with directions to deliver the same to the contractor when he accepted the allowance for extras. The certificate was not delivered by Mr. Clodius to the contractor, and nothing further appears to have been done until this action was brought. It was not alleged or claimed that the architect arbitrarily or fraudulently withheld the final certificate. At the trial the plaintiff called Mr. Clodius as a witness, and required him to produce the certificate with the claim and allowance for extras attached thereto, and offered the same in evidence. The court, while receiving the same in evidence, disregarded the deductions made by the architect, and allowed the whole claim of $521.15 for extras. In this we think the trial court was in error. The final certificate, unless arbitrarily or fraudulently withheld, was a prerequisite to the plaintiff's right to maintain this action to recover upon the contract. *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374.

The contract provides, at article 3, that, in case the owner and contractor fail to agree as to the amount to be paid or allowed for alterations, the determination of the amount shall be referred to arbitration. If it is conceded that the architect had no authority under the contract to fix the amount for extras, and the amount for defective work, and work not done,

still when he did so, he at least was acting as the agent for the owners, and if the contractor was not satisfied therewith, he should have made objection and required the dispute to be settled by arbitration under the terms of the contract. This was not done. Instead, the contractor made no objection, and after he brought this action, he required the production of the final certificate, which showed that it was issued upon condition that he accept the bill for extras as allowed by the architect. It is plain, we think, that he thereby waived any objection to the allowance for extras, and accepted the same as therein stated by the architect in the amount of $143.45. The court, however, allowed the whole claim of $521.15 for extras, and entered a decree for plaintiff for $987.30, less $550 for liquidated damages, leaving a balance of $437.30. This amount was too large by $377.70, being the difference between $521.15 claimed as extras, and $143.45 allowed for extras.

The appeal of the defendants is therefore sustained, and the cause remanded with direction to the lower court to decree a foreclosure of the lien in favor of the plaintiff for $59.60, with costs and attorney's fees as stated in the decree. The defendants will recover their costs on this appeal.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur

[No. 8828. Department Two. July 25, 1910.]

E. BECKMAN, *Appellant*, v. A. C. EDWARDS, *Respondent*.[1]

INSURANCE—INSOLVENCY OF COMPANY—LIABILITY OF AGENT. An insurance agent is not liable to the insured by reason of placing and carrying insurance in an insolvent company, where the company was authorized to do business in this state and was solvent at the time the policy was issued, and remained so until after the agent no longer represented the company.

INSOLVENCY — EVIDENCE — SUFFICIENCY. That an insurance company became insolvent nine months after a policy was issued, and in insurance reports its condition was rated as very weak, does not show that it was insolvent when the policy was issued.

FRAUDS, STATUTE OF—DEFAULT OF ANOTHER. An insurance agent is not bound by oral statements of his employee, made after a policy was issued and not known to him, to the effect that an insurance company was solvent and that they would stand back of the policy if the company was not good.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered March 10, 1910, upon granting a nonsuit at the close of plaintiff's case, dismissing an action in tort, after a trial before the court and a jury. Affirmed.

Samuel R. Stern, for appellant.

Nuzum & Nuzum, for respondent.

MOUNT, J.—Appellant brought this action to recover from the respondent the sum of $1,000, because of the alleged negligence of the respondent in insuring the appellant in an insolvent insurance company, and in permitting such insurance to remain in said insolvent company after the company had been placed in the hands of a receiver. At the close of plaintiff's evidence, the trial court directed a nonsuit, and dismissed the action. This appeal followed.

It appears that the respondent was an insurance agent, and in the year 1907, he represented the Pacific Mutual Fire In-

[1]Reported in 110 Pac. 6.

surance Company, a local company doing business in this state. In August, 1907, an employee of the respondent called upon the appellant and solicited insurance upon a certain stock of goods in Spokane. The appellant applied for a policy of insurance and it was issued. The name of the company by which this policy was issued is not shown. Soon after the policy was issued, the same employee of the respondent called again upon the appellant and took away the first policy and left another, and said to the appellant: "You see the policy is changed, but it is the same name put in the policy, and we are back of it, and if the company is no good, we are good for it," or words to that effect. The policy was one issued by the Pacific Mutual Fire Insurance Company for $1,000, on new and second-hand goods, in favor of the appellant. This company was authorized by the insurance commissioner of the state to transact the business of fire insurance in the state until December 31, 1907, and a certificate was regularly issued to that effect on January 2, 1907. The policy in question was issued on September 19, 1907. On March 18, 1908, the respondent resigned his agency for the company. The reason therefor does not appear. On July 24, 1908, the insurance company was adjudged insolvent, and a receiver was appointed therefor. On August 3, 1908, the stock of goods owned by the appellant and insured by the policy above referred to was damaged by fire, and it appears that the company refused to pay the loss.

It is not shown that the insurance company was insolvent at the time the policy was issued, and there is no evidence that the respondent knew, or should have known, that the company was insolvent at that time, except the mere fact that some nine months after the policy was issued the company was adjudged insolvent. The appellant offered to introduce in evidence certain copies of Best's Insurance Reports for 1908, but the evidence shows that the respondent had not seen these reports prior to the time the company was adjudged insolvent, and the reports did not show the insolvency of the

company. They did, however, say that "the company's condition is very weak."

While it is true that an agent may become liable to one insured where the insurance is placed in a company known to be insolvent or not authorized to do business in the state, no such facts appear in this case. The facts shown here are that the company was both authorized to do business in the state and was solvent at the time the policy was issued, and remained so for nine months thereafter. The authorities cited by the appellant do not, therefore, apply to this case. Where an agent provides a policy in a company which is solvent or generally considered so, he is not personally liable for a loss which occurs when the company subsequently becomes insolvent. *Gettins v. Scudder*, 71 Ill. 86. It was not shown that the respondent knew of the statements made by his employee after the policy was issued, or that the employee was authorized to make such statements. But if respondent did know of such statements, they were made after the policy was issued, and were not made as an inducement to the appellant to take the policy, and the statements were not made in writing. It is clear, therefore, that no liability was shown against the respondent.

The judgment must be affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8857. Department Two. July 25, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. LIZZIE MAY, *Appellant*.[1]

RAPE—DEFENSES—EVIDENCE OF MARRIAGE RELATION—SUFFICIENCY. In a prosecution for the carnal abuse of a child, the fact that she was not married to the principal offender appears indirectly and is sufficiently shown to submit the issue to the jury, where she was under fourteen years of age, a mere school girl, living with her parents and bearing her maiden name, and the fact was not questioned at the trial.

RAPE—CORROBORATION OF PROSECUTRIX. Upon a charge of accessory to carnal abuse of a child, letters and oral evidence of the defendant may constitute sufficient corroboration of the testimony of the prosecutrix.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 24, 1910, upon a trial and conviction of the crime of carnally abusing a female child. Affirmed.

Edward C. Mills, for appellant.

Everett J. Smith, for respondent.

MOUNT, J.—The appellant was convicted, as accessory before the fact, of the carnal abuse of her own thirteen-year-old child. She appeals from the sentence upon such conviction, and argues that the trial court erred in giving and refusing certain instructions, and also that the evidence was insufficient to support the conviction. It is sufficient to say of the instructions that those refused were given substantially as requested, and that those given clearly cover the law of the case.

The principal contention of the appellant is that the evidence is insufficient, because there is no proof in the record that the child was not the wife of one Gust Arndt, who actually committed the crime. It is true there is no direct

[1]Reported in 109 Pac. 1026.

and positive evidence that the child was not married to Arndt. It was apparently assumed by counsel throughout the trial of the case that the marriage relation did not exist, and no direct testimony was offered upon that question. But it was shown that the child was under the age of fourteen years, that she was living at home with her father and mother, and bearing her maiden name. In fact, she was a mere school girl, and there is nothing in the record to indicate that she was married. All the circumstances indicate beyond question that she was unmarried, and certainly was not the wife of Arndt. While it is the rule that want of the marriage relation is an essential ingredient of the crime and must be alleged and proved, still it is not absolutely necessary to prove that fact by direct and positive testimony; but, like any other fact, it may be proved by facts and circumstances from which the conclusion may be drawn. *State v. Reed*, 153 Mo. 451, 55 S. W. 74; *Lewis v. People*, 37 Mich. 517; *Brenton v. Territory*, 15 Okl. 6, 78 Pac. 83, 6 Am. & Eng. Ann. Cas. 769; *Munger v. State*, 57 Tex. Cir. 384, 122 S. W. 874; *State v. Pipkin*, 221 Mo. 453, 120 S. W. 17. The facts above stated were sufficient to go to the jury upon that question.

It is also argued that there is no sufficient corroboration of the prosecuting witness. But the letters in evidence written by the appellant, and her oral testimony, are sufficient for that purpose.

There is no error in the record, and the judgment is affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8801. Department One. July 25, 1910.]

REAL ESTATE INVESTMENT COMPANY, *Appellant*, v. THE CITY OF SPOKANE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—APPEAL — STATUTES. The act of 1905 (Rem. & Bal. Code, § 7905), entitled an act to validate municipal assessments and to prohibit setting the same aside except for fraud, was not intended to repeal the act of 1901 (Rem. & Bal. Code, § 7552), authorizing an appeal from the confirmation of an assessment by the city council to the superior court, and does not affect such appeals or the procedure therein.

SAME—PROTESTS—FORM—OBJECTIONS. A notice of appeal from the confirmation of an assessment by a city council may be informal, and is sufficient if it is made to appear that the owner protests against the costs as excessive and disproportionate to the value of the property, and because the benefit is not in proportion to the cost, it only being necessary to clearly state the grounds of the objection.

SAME—CONFIRMATION OF ASSESSMENT—RESOLUTION OR ORDINANCE —APPEAL. Under Rem. & Bal. Code, § 7532, providing that the city council shall confirm an assessment as corrected by resolution or ordinance, in conformity with the charter, a city council may confirm an assessment by resolution, although another ordinance provides that all orders of confirmation shall be by ordinance, since the power of the council depends upon the general law and the charter; hence an appeal from a resolution confirming an assessment is not premature.

APPEAL—DECISION—REMAND. Where an assessment by a city council is erroneously confirmed on appeal to the superior court, for the reason that no fraud had been shown, without considering the merits, the case will be remanded for a full hearing in the court below.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered September 22, 1909, upon motion of the defendant, confirming an assessment roll for a public improvement. Reversed.

Post, Avery & Higgins, for appellant.

E. O. Connor and *Cullen & Dudley*, for respondent.

[1]Reported in 109 Pac. 1057.

CHADWICK, J.—The city of Spokane, by appropriate preliminary proceedings, declared its intention to improve a part of Prospect street in that city, made an estimate of the cost of the improvement, and prepared an assessment roll which came on for hearing on the 8th day of December, 1908. The hearing was then continued until December 22, 1908, when is was considered upon the following objection and protest theretofore filed by appellant:

"Spokane, Wash., Nov. 13, 1908.
"To the Honorable City Council:

"The undersigned, owners of property along Prospect avenue, protest against the grading and sidewalking of said avenue between Grand street and City View street, according to the plans and specifications now on file in the city engineer's office, and respectfully petition that the assessment for grading and sidewalking said avenue be not confirmed.

"The bid for grading said avenue is $9,620, and for sidewalking the same is $1,720. The foregoing charges, in our judgment, are excessive. Our properties are not sufficiently valuable to justify any such expenditure. The benefit which we will receive will not be anywhere near in proportion to the cost of this work. A few years ago Grand street north of Twelfth avenue was graded at what was deemed to me a high cost. The Grand street grade is now being contested in the courts upon the ground of the excessive cost, with the likelihood of the assessment on that street being declared invalid. The Prospect avenue assessment approximates the Grand street assessment just mentioned. We ask that the present assessment be not confirmed, so we may have an opportunity to work out a plan of grading that will be satisfactory to us and at a reasonable cost. Respectfully."

Then followed the name of the property owner, a description of its property, and the particular sums assessed against the several tracts. At the time set for hearing, appellant appeared by counsel and orally protested. Appellant's objections were overruled, and a resolution passed confirming the assessment. An appeal was taken to the superior court within ten days thereafter. On January —, 1909, the city

duly passed an ordinance confirming the assessment roll, but no appeal was thereafter taken by appellant, it relying upon its appeal from the order evidenced by the resolution. After a trial on the merits had proceeded to some length, and appellant had rested, judgment was entered on motion of respondent, confirming the assessment upon the ground and for the reason that no testimony had been adduced to show that the council acted in bad faith or fraudulently in levying and confirming the assessment.

The learned trial judge felt himself bound by the terms of chapter 150, Laws of 1905, page 281 (Rem. & Bal. Code, § 7905 *et seq.*), entitled: "An act to validate assessments made, or which may be made, to pay for local improvements, by any incorporated city in this state, and to prohibit the setting of such assessments aside or declaring the same invalid upon any ground other than upon the ground of fraud;" rather than by chapter 118, Laws of 1901, page 243, § 2 (Rem. & Bal. Code, § 7552), under which the appeal had been taken. Reference to the act of 1905 will show that it nowhere and in no way refers to appeals or appellate procedure, but is an independent act which, although inartificially drawn, seems intended to validate all assessments, unless fraud be affirmatively shown when such assessments are drawn in question, upon a foreclosure proceeding. We cannot believe that it was the intention of the legislature when enacting the law to nullify and repeal by implication the act of 1901, allowing an appeal to be taken from an onerous or oppressive assessment or one made without reference to the benefits when levied under an ordinance so providing. The act of 1905, being independent of all others, was, in our opinion, clearly intended to save assessments of the tax—except in cases of fraud—when attacked collaterally, leaving to the aggrieved property owner existing remedies and the right to raise any objection upon direct attack. We are convinced that the statute of 1905 was passed to meet this condition and is not controlling in this case, and so hold.

But it is insisted that, although appellant had the right of appeal, the judgment must be sustained for two reasons, (1) the protest made by appellant was insufficient to operate as an objection under the statute, and (2) the appeal was premature, being taken before the passage of the ordinance confirming the assessment, by which method alone a legal confirmation may be had. Treating these propositions in their order, we may admit that the protest which we have set out is informal, and would not be sustained as a sufficient pleading in a court of law. But the statute contemplates that the proceedings before the city council will be informal, and if it be made to appear that the property owner appeared and objected, although in the most general terms, he should not be denied his remedy, or his protest be measured by the technical rules of pleading. There was enough to show, that the property owner considered the whole cost of the improvement excessive, that its property was not sufficiently valuable to justify the expenditure, that the benefit was not in proportion to the cost of the work, that it desired to suggest or bring about a plan of grading at a more reasonable cost; and that the assessment should not be confirmed. All that is required is that the "objection shall state clearly the grounds of objection." The protest was clear enough to put the council to a consideration of it, and this being so, it was sufficient to sustain a right of appeal.

Nor do we think the appeal was premature. The charter of the city, § 67, is silent as to the manner of confirmation; but the statute, Laws 1901, page 240, § 2 (Rem. & Bal. Code, § 7532), provides that the council shall "confirm the same, as corrected by resolution or ordinance, in conformity with the charter of such city." But it is said that, inasmuch as the Ordinance No. A-1,088, § 8, provides that,

"At the time appointed for hearing objections to such assessment the council shall hear and determine the objections which have been filed by any party interested to the regularity of the proceedings in making such assessment and to the correctness of the amount of such assessment, or of the

amount levied upon any particular lot or parcel of land; . . . and confirm the same as corrected, or set aside such roll, and order that said assessment be made *de novo*, or refuse to confirm such roll, as to the council shall appear equitable and just. *All orders of confirmation shall be by ordinance*,"

no confirmation could be legally made except by ordinance; and the case of *Bellingham Bay Imp. Co. v. New Whatcom*, 17 Wash. 496, 50 Pac. 477, is cited as conclusive upon this point. That case arose under chapter 95, Laws 1893, page 226, and aside from the fact that the act of 1893 provided in terms that the assessment or reassessment should be approved and confirmed *by ordinance*, we find by examination of the briefs and records in that case that objections had been considered by a committee of the whole council which had reported its consideration and recommendation, but no action either by resolution or ordinance had been taken by the council at the time of the appeal. The power of the council must rest upon the charter and the general law so far as it has assumed to declare the attendant procedure, and when the council has, either by resolution or ordinance, approved the roll, it is conclusive so far as the objecting property owner is concerned; for the object of the 1901 law in this regard is to fix the time and the fact rather than the manner of the council's doings.

Respondent has discussed in some degree the merits of the case, but we conceive from a consideration of the whole record that the court entered judgment confirming the assessment because of the technical objection that no fraud had been shown, and not upon the merits, and therefore the merits of the case should not be decided without a full hearing in the court below.

For the reasons assigned, the judgment of the lower court is reversed, and this cause is remanded for a new trial.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8534. Department One. July 25, 1910.]

HENRY M. OERTER, *Appellant*, v. LOUIS ZIEGLER, *Respondent*.[1]

LANDLORD AND TENANT—NEGLIGENCE—INJURY FROM ICE ON STEPS—DUTY OF LANDLORD. The owner of an office building, who had leased the basement to different tenants, approached by a flight of outside steps which were in reasonably safe condition, is not under obligation to protect them from the elements, and is not liable to a customer of one of the tenants who was injured by a fall caused by a thin coat of ice on the steps; since the landlord is liable in such case only for general repairs and not for temporary obstructions arising from natural causes such as the accumulation of ice and snow.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 8, 1908, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for personal injuries sustained by falling down a stairway, after a trial before the court and a jury. Affirmed.

Robertson, Miller & Rosenhaupt, for appellant, contended, among other things, that the defendant's negligence in maintaining the steps was a question for the jury. 2 Remington's Dig., p. 2140, § 40, and cases cited; 37 Cent. Dig. Negligence, § 279; *Smith v. Tacoma*, 51 Wash. 101, 98 Pac. 91, 21 L. R. A. (N. S.) 1018; *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140; *Brady v. Valentine*, 3 Misc. 20, 21 N. Y. Supp. 776; *Harrinson v. Jelly*, 175 Mass. 292, 56 N. E. 283; *Peil v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381; *Roe v. Mayor etc. of New York*, 4 N. Y. Supp. 447. Allowing ice to accumulate on these steps, under the circumstances, was alone some proof of negligence. *McConnell v. Bostlemann*, 72 Hun 238; *Herrman v. Great Northern R. Co.*, 27

[1]Reported in 109 Pac. 1058.

Wash. 472, 68 Pac. 82, 57 L. R. A. 390; *Kirby v. Boylston Market Association*, 80 Mass. 249, 74 Am. Dec. 682; *Loois v. Eureka Club*, 37 App. Div. 628, 56 N. Y. Supp. 66. It was error to exclude expert evidence offered to show that the steps were originally constructed in an improper manner and were dangerous. *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555; *Pelamourges v. Clark*, 9 Iowa 1; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *Emerson v. Lowell Gas Light Co.*, 88 Mass. 146, 83 Am. Dec. 621; *Smith v. Gugerty*, 4 Barb. 614; *McConnell v. Osage*, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; *Blank v. Livonia*, 79 Mich. 1, 44 N. W. 157; *Kuhn v. Delaware*, 92 Hun 74; *Indianapolis v. Scott*, 72 Ind. 196; *Morgan v. Fremont County*, 92 Iowa 644, 61 N. W. 231; Jones, Evidence (2d ed.), § 380, and cases cited. Experts may testify as to the customary and ordinary methods, and the rules adopted in the same kind of work, as bearing on the safety of construction. *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276. 82 Pac. 273; *Houston etc. R. Co. v. Cowser*, 57 Tex. 293; *Aldrich v. Monroe*, 60 N. H. 118; *Kolsti v. Minneapolis etc. R. Co.*, 32 Minn. 133, 19 N. W. 655; *Coates v. Burlington etc. R. Co.*, 62 Iowa 486, 17 N. W. 760; *Jeffrey v. Keokuk etc. R. Co.*, 56 Iowa 546, 9 N. W. 884; *Cross v. Lake Shore etc. R. Co.*, 69 Mich. 363, 37 N. W. 361, 13 Am. St. 399; *Tinney v. New Jersey Steamboat Co.*, 12 Abb. Prac. (N. S.) 1; *Minnequa Springs Imp. Co. v. Coon*, 10 Wkly. Notes 502; *Armstrong v. Chicago, M. & St. P. R. Co.*, 45 Minn. 85, 47 N. W. 459. The opinion of persons familiar with the facts, as to the reasonably safe condition of the steps, was admissible, even if they were not experts. *Taylor v. Town of Monroe*, 43 Conn. 36; *McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. 57; *Baltimore & Y. T. Co. v. Crowther*, 63 Md. 558, 1 Atl. 279; *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560; *Beatty v. Gilmore*, 16 Pa. St. 463; *Gulf etc. R. Co. v. Colbert* (Tex. Civ. App.), 31 S. W. 332; *Bridger v. Asheville etc. R. Co.*, 25 S. C. 24; *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309; *Laughlin v.*

Street R. Co. of Grand Rapids, 62 Mich. 220, 28 N. W. 873; *Kitchen v. Union Tp.*, 171 Pa. 145, 33 Atl. 76. Proof of other accidents was improperly excluded. *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674; *District of Columbia v. Armes*, 107 U. S. 519; 20 Cent. Digest, Negligence, § 412; 37 Id. §§ 242, 247; Jones, Evidence (2d ed.), § 163, and cases cited. *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84; *Smith v. Tacoma, supra; Larkin v. O'Neill*, 48 Hun 591.

Roche & Onstine, for respondent.

PER CURIAM.—This was an action to recover damages for personal injuries. At the close of the plaintiff's testimony, the court directed a judgment in favor of the defendant, from which this appeal is prosecuted.

The material facts disclosed by the appellant's testimony are the following: The respondent is the owner of a five-story brick building in the city of Spokane, known as the Ziegler block, the basement of which is occupied by different tenants. A stairway leads from the street or sidewalk to these different tenements. This stairway is seven feet in width and consists of ten concrete steps with a ten-inch tread and an eight-inch riser, with an iron railing extending the full length of the stair on either side. On the evening of January 30, 1908, the appellant descended this stairway, accompanied by a friend, for the purpose of entering a barber shop in the basement. The appellant had patronized this same shop several times a week for a period of five years, in all sorts and conditions of weather. As they descended the stair together, the appellant's companion slipped on the third or fourth step, and caused the appellant to fall, resulting in the injury complained of. The appellant contends that the steps were worn and defective, that they were covered with a thin coating of ice, and that the respondent negligently failed to protect them from the elements by an awning or otherwise.

When a tenant is given the exclusive possession of demised premises, as a general rule, the landlord is not liable for injuries to third persons, arising from defects in the premises, unless such defects existed at the commencement of the term, or unless the landlord is obligated by the terms of his lease to make repairs. *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956.

On the other hand, the weight of authority holds, that where different portions of a building are leased to different tenants, the landlord must use due diligence to keep the passageways, and such parts of the building as are used by the different tenants in common, in a reasonably safe condition, and is liable in damages for a failure so to do. 18 Am. & Eng. Ency. Law (2d ed.), p. 220. This obligation, however, only extends to general repairs, and does not impose on the landlord a liability for injuries resulting from temporary obstructions arising from natural causes, such as the accumulation of ice or snow. *Woods v. Naumkeag Steam Cotton Co.*, 134 Mass. 357, 45 Am. Rep. 344; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124, 10 Am. St. 260, 3 L. R. A. 458.

Applying these rules to the case at bar, we find no error in the ruling of the court below. While the steps were somewhat worn, their general condition was reasonably safe, and the owner of the building was under no obligation to protect them from the elements by awning or otherwise. The ice on the steps was the natural and proximate cause of the injury, and for its presence the landlord was not responsible. *Woods v. Naumkeag Steam Cotton Co.*, *supra*. The obligation to remove the ice rested upon the tenants, and for their failure or neglect the landlord is not answerable in damages.

The judgment is therefore affirmed.

[No. 8623. Department Two. July 26, 1910.]

CENTRAL CHRISTIAN CHURCH, *Respondent*, v. EUGENE LENNON, *Appellant*.[1]

EASEMENTS—DEEDS—FORFEITURES—CONSTRUCTION. The grant of a "right of way" fourteen feet wide, on condition that it shall be forfeited if the grantee erect any structure of any kind or fence or place any material or obstruction on said right of way other than the construction and repair of walks, is not limited to a walk for footmen; and the same would not be forfeited by the placing thereon of forty or fifty loads of earth for making the same more accessible and convenient for a driveway and which was not an obstruction; since forfeitures are to be strictly construed, and the violation of a condition must be wilful and substantial and not merely technical.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered July 14, 1909, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an injunction, and for damages. Affirmed.

Dunphy, Evans & Garrecht, for appellant.

Sharpstein & Sharpstein, for respondent.

MOUNT, J.—About December, 1902, the appellant sold to one L. J. Bierwagon a tract of land in the city of Walla Walla. The easterly part of this tract of land or lot fronted on Palouse street. Appellant owned land to the west of the lot sold to Mr. Bierwagon, and at the time of the sale appellant also sold to Mr. Bierwagon a right of way over a strip of land fourteen feet wide, adjoining the lot mentioned on the west. This strip of land over which the right of way was granted did not connect with streets at either end, but between the southerly end of this granted right of way and Alder street, a street to the south, the appellant had an easement over a V-shaped lot owned by one L. F. Anderson, which V-shaped lot was in parking and cement walks. The instru-

[1]Reported in 109 Pac. 1027.

ment conveying the easement from appellant to Bierwagon contained the following recital:

"Upon the condition that neither the party of the second part, his heirs or assigns, shall at any time erect any structure of any kind or fence or place any material or obstruction on said right of way or any portion thereof, other than a construction and repair of walks, and that if at any time any of the aforesaid conditions are violated in any way the party of the second part, his heirs or assigns, shall forthwith and without action or suit forfeit all right to the aforesaid described right of way and his or their interest, and all thereof in and to the same shall forthwith revert to and be vested in the parties of the first part, their heirs and assigns."

Thereafter this right of way was used in common by the appellant and Bierwagon, as a means of access from Alder street to the rear of the property owned by each of them. After the purchase of this property, Mr. Bierwagon conveyed all his interest to one Dixon, who erected a large barn upon the lot facing upon Palouse street. It is claimed by the appellant that this barn projected over the fourteen-foot right of way some three or four inches. This fact, however, was disputed. Mr. Dixon used the right of way for the purpose of hauling hay and other things to the rear of his barn. He also placed some forty or fifty loads of earth on the right of way, in order to fill in a depression so that a wagon could be more readily driven in or backed out over the right of way. This filling in was done while appellant was away from his home, but he was informed thereof upon his return. There is dispute in the evidence as to whether appellant made objection upon learning thereof. At any rate, the way was used thereafter as formerly, and Mr. Dixon promised that, if the fill was in the way, he would remove it when appellant desired to build upon his adjoining land to the west. Later Mr. Dixon entered into an agreement to sell the lot and his interest in the right of way to the Central Christian Church. Thereafter appellant notified Mr. Dixon and the trustees of the church that all interest in the right of way was forfeited

to the appellant, and he thereupon entered upon the strip of land and commenced to excavate thereon. The Central Christian Church thereupon brought this action to restrain the appellant from so doing, and for damages. Upon a trial of the case the trial court found in favor of the plaintiff, and entered a decree substantially as prayed for in the complaint. The defendant has appealed, claiming that the projection of the barn upon the right of way and the placing of dirt thereon had forfeited the use of the right of way.

We think the evidence fails to show that the barn projected upon the right of way, and shall not consider that question further. The grant of the right of way provided that the purchaser "shall not at any time erect any structure of any kind, or fence or place any material or obstruction on said right of way or any part thereof other than the construction and repair of walks." Appellant argues that the use granted was for a walk and nothing more, but the deed of grant does not so restrict the use. The width of the right of way and its position would indicate that it was for any usual use, such as an alley or driveway, and it was used for that purpose from the beginning. Unless the use was specifically defined and limited by the grant to a walk for footmen, it would not be so construed when it was wide enough and so located as to indicate that it was for general use as such ways are usually and customarily used. The mere fact that permission was granted to place materials thereon and obstruct the way to repair walks does not necessarily indicate that the way was to be used exclusively for such walks. We are also of the opinion that the placing of forty or fifty loads of earth on the right of way did not forfeit the same. It is not claimed that the placing of this earth on the right of way was an obstruction to its use. At any rate the evidence is clear that no such obstruction was created thereby. In fact, the earth was placed there for the purpose of making the way more accessible and its use more convenient, and it appears to have done so. The forfeiture clause in a deed

must always be strictly construed against the grantor, and nothing will be held to cause a forfeiture unless it plainly appears to be such. 17 Cyc. 89; 2 Devlin, Deeds, § 793. In order to justify a forfeiture for the violation of the condition, the violation must be wilful and substantial and not merely technical. *Mills v. Evansville Seminary*, 58 Wis. 135, 15 N. W. 133; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335. The apparent object of the restriction in this case was to prevent obstructions upon the right of way. It certainly was not intended that no improvements should be made upon the right of way so that it might be made more useful as such; especially when the way was not obstructed in order to do so. The language of the condition as expressed in the deed indicates very plainly that no obstructions shall be made except in the repair of the walk. Improvements which do not obstruct the way are not prohibited.

The judgment appealed from was right, and it is therefore affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8797. Department One. July 28, 1910.]

EASTERN OUTFITTING COMPANY, *Appellant*, v. J. MANHEIM *et al.*, *Respondents*.[1]

TRADE-MARKS AND TRADE-NAMES—CORPORATIONS — RIGHT TO USE NAME—FRAUD—INJUNCTION. A corporation organized in this state under the name of "Eastern Outfitting Company" for the purpose of selling cloaks, suits and men's clothing, has no exclusive right to the use of the name throughout the state for that purpose; and where its business had been confined to a retail and mail order business in the vicinity of Seattle, it will be enjoined from opening a branch house under the same name in Spokane, for the purpose of defrauding the public and a copartnership that had for several years been doing the same kind of business under the same name in the city of Spokane, where there had been no confusion theretofore owing

[1]Reported in 110 Pac. 23.

to the fact that neither had invaded the territory of the other (MORRIS and CHADWICK, JJ., dissenting).

SAME—UNFAIR COMPETITION—INJUNCTION—RELIEF. In such a case, the corporation (which was first in the use of the name) is not entitled to an injunction preventing the further use of the trade-name by the copartnership; since protection to a trade-name is only coextensive with the market, and there cannot be unfair trade competition unless there is competition (MORRIS and CHADWICK, JJ., dissenting).

SAME—TRADE-NAME—CORPORATIONS—NAMES. The name of a corporation is not its trade-mark, as the latter refers to the thing sold, and a trade-name embraces both the thing and the individuality of the seller.

APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR. Upon an appeal from an order enjoining the use of a trade-name, the appellant is not entitled to have the court review an order punishing a third person for violating the injunction.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered November 27, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

Samuel R. Stern, for appellant, contended, *inter alia*, that a corporation is protected in the use of its name. Cook, Corporations (6th ed.), § 15; Clark & Marshall, Corporations, pages 155, 156; *Paulino v. Portuguese Beneficial Ass'n*, 18 R. I. 165, 26 Atl. 36, 20 L. R. A. 272; *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436, 21 N. E. 875; Nims, Unfair Business Competition, pages 199, 215-217; 10 Cyc. 151, art. 3; *Sanders v. Utt*, 16 Mo. App. 322; *Sanders v. Jacob*, 20 Mo. App. 96; *State v. McGrath*, 92 Mo. 355, 5 S. W. 29; *Illinois Watch Case Co. v. Pearson*, 140 Ill. 423, 31 N. E. 400, 16 L. R. A. 429; *Elgin Butter Co. v. Elgin Creamery*, 155 Ill. 127, 40 N. E. 616; *Ottoman-Cahvey Co. v. Dane*, 95 Ill. 203; *Tussaud v. Tussaud*, 44 Chan. Div. L. R. 678. The mere fact that two concerns happen to be widely separated geographically is no proof that no confusion can or may result by the use of the name by both. Nims, Unfair Business Competition, p. 224. *Samuels v. Spitzer*, 177 Mass.

226, 58 N. E. 693; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123. An injunction will be granted although the business of the parties was not in the same locality. *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.*, 120 Mich. 159, 78 N. W. 1072, 44 L. R. A. 841; Hopkins, Trade-Marks, § 13; *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Hygeia Distilled Water Co. v. Consolidated Ice Co.*, 144 Fed. 139; *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514; *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116. See, also, *Edison Storage Battery Co. v. Edison Automobile Co.*, 67 N. J. Eq. 44, 56 Atl. 861; *Philadelphia Trust etc. v. Philadelphia Trust Co.*, 123 Fed. 534; *Nesne v. Sundet*, 93 Minn. 299, 101 N. W. 490, 106 Am. St. 439; *Rogers v. William Rogers Mfg. Co.*, 70 Fed. 1017; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 95; *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.*, 21 Fed. 276; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 63 Pac. 480, 82 Am. St. 346, 53 L. R. A. 384; *Newby v. Oregon Cent. R. Co.*, Fed. Case, No. 10,144; *Holmes etc. v. Holmes*, 37 Conn. 278, 9 Am. Rep. 324; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 43 Am. St. 769, 27 L. R. A. 42; *Investor Pub. Co. v. Dobinson*, 72 Fed. 603; *Bissell Chilled Plow Works v. Bissell Plow Co.*, 121 Fed. 357; *Buzby v. Davis*, 150 Fed. 275; *Dale v. Smithson*, 12 Abb. Pr. 237; *De Youngs v. Jung*, 7 Misc. Rep. 56, 27 N. Y. Supp. 370.

Cohn, Rosenhaupt & Blake and *A. M. Winston*, for respondents.

Gose, J.—The plaintiff brought this action to enjoin the defendants from using the name "Eastern Outfitting Company." There was a decree in favor of the defendants, enjoining the plaintiff from using the name in the city of Spokane. The plaintiff has appealed.

Appellant is a foreign corporation, organized in the state of California under the name of "Eastern Outfitting Com-

pany of Seattle, Washington." In March, 1902, it filed for record in the office of the secretary of state of this state a certified copy of its articles of incorporation, and otherwise complied with the laws of this state respecting foreign corporations doing business here. The essential facts are that the appellant, since 1902, has been engaged in the business of selling "cloaks and suits, also gents' clothing," in the city of Seattle, and its vicinity. Its mode of doing business, as testified by its manager, has been to sell on credit, receiving a cash payment of a few dollars at the time of the sale, and weekly or monthly payments thereafter until the purchase price is paid. It did no business in the eastern part of the state, aside from a single transaction with one customer who had moved from Seattle to Spokane. It has, in addition to its local trade, a mail order business in the territory adjacent to Seattle. The respondents were at one time copartners, doing a retail mercantile business in the city of Spokane under the name of "Eastern Outfitting Company." The business was started under this name by the respondent J. Manheim, in April or May, 1905. Later he associated Nathan Manheim with him in the business and, before the commencement of the action, the latter acquired the entire ownership, and continued to conduct the business in the old name. There is no evidence that the respondents had any trade outside of the city of Spokane. About August, 1909, the appellant undertook to open a place of business in Spokane under the name of "Eastern Outfitting Company," and advertised that it had an exclusive right to the use of that name.

The court found, that the business of both the appellant and the respondents is a retail installment business, purely local in character; that the respondents have expended large sums of money in advertising the business, and have established a large cash and installment business under their tradename; and that in August, 1909, the appellant, with the intention to cheat and defraud the respondents and the public,

sought to lure the public into its place of business in the city of Spokane by taking the respondents' trade-name, and thus divert and appropriate their business. The findings are supported by the evidence.

The appellant contends that it has the exclusive right to the use of the name "Eastern Outfitting Company" throughout the state, because of its compliance with the laws of the state with respect to foreign corporations. We cannot concur in this view. The respective parties adopted the same trade-name and engaged in the same general business, but at points remote from each other, and they are to be dealt with precisely as if the names were those of private firms or copartnerships. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94.

"No advantage accrues to a name of a corporation because it is borne by a corporation." Nims, Unfair Business Competition, page 198.

The appellant next urges that, upon the principle of unfair business competition, the respondents should be enjoined from the further use of the trade-name. This position is untenable. In considering this question it is essential that the distinction be kept in mind between a trade-name as applied to a local business and a trade-name as applied to a general business. In *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116, speaking to the identical question, we said:

"The general rule is, as before quoted, that one person may not use the name of another already in the same line of business so that confusion or injury results therefrom."

This principle, stated in varying phraseology, may be found both in the text books and in the adjudged cases. In cases like the one at bar the fact to be ascertained is, what is the market of the complaining party. His protection is coextensive with his market. Nims, § 114. "But there is no standard, except what the court in each particular case believes has worked fraud, or may work fraud or loss to the

plaintiff." Nims, § 108. There cannot be unfair trade competition unless there is competition. *Sartor v. Schaden*, 125 Iowa 696, 101 N. W. 511.

The doctrine of unfair competition is based upon the principle of common business integrity, and equity only affords relief when this principle has been violated. *Hainque v. Cyclops Iron Works*, 136 Cal. 351, 68 Pac. 1014; *Sartor v. Schaden, supra.* The mischief which a court of equity will guard against is a confusion in names, or in the identity of parties, or in the goods sold, so as to deceive the public and work a fraud upon the party having a right to the trade-name. *Philadelphia Trust, Safe Deposit & Ins. Co. v. Philadelphia Trust Co.*, 123 Fed. 534; *Celluloid Mfg. Co. v. Cellonite Mfg. Co., supra; Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, 145 N. C. 367, 59 S. E. 123; *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. (N. S.) 964.

It is manifest that the respondents, doing a retail business in Spokane, could not pass off their goods as the appellant's goods, or pass themselves off as the appellant. The respondents did not invade the appellant's territory but, on the other hand, it sought to invade their territory after they had devoted years of time and labor to giving a reputation to the name in the city of Spokane. Before the appellant attempted to open a business in Spokane, there had been no confusion and no deception practiced upon the public or the appellant's customers. We have treated the question as if the parties had used the same trade-name, and have given no consideration to the fact that the words "Seattle, Washington," were a part of the corporate name of the appellant.

The contention of the appellant that the name is its trade-mark cannot be upheld. As a general rule a trade-mark has reference to the thing sold, whilst a trade-name embraces both the thing sold and the individuality of the seller. *Armington v. Palmer*, 21 R. I. 109, 42 Atl. 308, 79 Am. St. 786, 43 L. R. A. 95; *Sartor v. Schaden, supra.*

"The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article." *Canal Co. v. Clark*, 13 Wall. 311, 322.

A third party was punished for contempt for violating the injunction order. The appellant seeks to review the contempt order on this appeal. It cannot be so reviewed.

The appellant suggests that error was committed in rejecting and admitting certain evidence. Neither the evidence admitted nor that rejected was material in determining the issue.

The decree is affirmed.

RUDKIN, C. J., and FULLERTON, J., concur.

MORRIS, J. (dissenting)—I dissent. When appellant fully complied with the laws of this state, it became entitled to do business within this state and within the entire state. It had no locality except the state itself. The fact that it selected Seattle as its situs did not confine its business to that city, nor circumscribe to any extent its powers. It was a corporation in Spokane, and as much entitled to do business there, and to have its name protected while engaged in such business, as it was in Seattle. I do not comprehend upon what theory appellant can be clothed with greater powers in Seattle and less in Spokane. I know no law making such a distinction. Its powers are coextensive with the state, and should be so regarded and protected. Our statute, Rem. & Bal. Code, § 3680, protects it in the exclusive use of its chosen name, and such protection should be extended to all portions of the state. The judgment should be reversed.

CHADWICK, J. (dissenting)—Aside from the considerations advanced by Judge Morris, in which I concur, it seems to me that the reasoning of the majority defeats itself. It proceeds upon the theory that a business once established

must cover a whole field in its inception, rather than upon the evident fact, proven by the history of the whole business world, that a business legitimately organized is entitled to the protection of the law in its development from a small local concern to the larger concern into which it has the natural right to grow. Another reason, and to my mind a forceful one, why the judgment of the lower court should be reversed, is that the rule allowing an injunction to protect a trade-name cannot be invoked by defendants in this case. The business of defendants is a partnership, and it is an established principle of law that a partnership can have no property in a trade-name which imports that it is a corporation, and especially so where there is a corporation organized and doing business in the state under the same name and under the protection of the statute. *Clark v. Aetna Iron Works*, 44 Ill. App. 510, cited in 28 Am. & Eng. Ency. Law (2d ed.), p. 356. In the same text, at page 368, the rule is laid down that:

"A peculiar collocation of words which, although descriptive in their meaning, are arbitrary in their selection and arrangement, and are not the only words which could be employed to describe the article to which they are applied, may be protected as a trade-mark. It is not always clear, nor often very material, in this class of cases, whether protection is afforded upon the ground of technical trade-mark or upon the ground of unfair competition. It is so easy to avoid any similarity, that its mere existence is almost conclusive proof of a fraudulent intent, and hence of unfair competition. At all events, a deceptive imitation will be enjoined."

The same rule applies by analogy to trade-names. In 10 Cyc., at page 151, the general rule is stated to be that:

"While the name of a corporation is not in strictness a franchise, yet the exclusive right to its use may be protected in equity by the writ of injunction by analogy to the protection of trade-marks, just as the name of an individual, a partnership, or a voluntary association may be so protected."

This would be the rule if we had no statute against the duplication of corporate names, and should certainly be applied where the policy of the law has been declared by the legislature to be that confusion in names of business concerns shall be avoided.

[No. 8201. *En Banc.* August 1, 1910.]

THOMAS K. JOHNSTONE, *Respondent*, v. I. N. PEYTON *et al.*, *Appellants.*[1]

PROCESS—SUBSTITUTED SERVICE—KNOWLEDGE OF RESIDENCE—JUDGMENT—VALIDITY. A decree of foreclosure of a mortgage, obtained on publication of a summons mailed to the defendant at Toronto, is void, where the plaintiff knew defendant's address to be at Chicago, and defendant had no knowledge of the suit.

SAME—EVIDENCE—SUFFICIENCY. A finding that the plaintiff in a foreclosure suit instituted in 1903 knew the post office address of the defendant to be at Chicago, will not be disturbed on appeal, where it appears that he had resided there since the execution of the mortgage, except for about six months in 1892, and defendant testified that he and the plaintiff were intimately acquainted for many years and had occasional correspondence and had met in Chicago on several occasions since his return there, although he was flatly contradicted by the defendant.

LIMITATION OF ACTIONS—ACCRUAL—DISCOVERY OF FRAUD—LACHES. An action to set aside a fraudulent judgment of foreclosure is not deemed to have accrued until the discovery of the facts constituting the fraud; and the mortgagor, although extremely dilatory and in default for years, is not barred where he commenced an action to vacate the decree within a few months after discovery of the judgment.

SAME—IMPUTED NOTICE—MORTGAGES—JUDGMENT. Notice of entry of a fraudulent judgment is not imputed to a mortgagor who was in default for several years, especially where he met the mortgagee after the foreclosure, which was not disclosed, although the mortgage indebtedness was the subject of conversation between them.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 15, 1908, upon find-

[1]Reported in 110 Pac. 7.

ings in favor of the plaintiff, in an action to vacate a decree foreclosing a mortgage, after a trial on the merits before the court. Affirmed.

Wakefield & Witherspoon, for appellants.

W. C. Jones and *Wm. T. Stoll*, for respondent.

CHADWICK, J.—Some time prior to the 1st day of June, 1892, the plaintiff, who was a resident of the city of Chicago, purchased from the defendants, who were residents of the city of Spokane, certain real property in Spokane county. On the above date the defendants executed a deed of the property thus purchased in favor of the plaintiff, and took back a purchase money mortgage in the sum of $1,675. On the 25th day of March, 1893, the plaintiff paid to the defendants the sum of $182.75, by check on a Chicago bank, to cover the interest on the mortgage indebtedness up to June 1, 1893, and the 1892 taxes against the mortgaged property. Since that date no further payments have been made on account of principal, interest, or taxes.

At or about the date of the execution of the mortgage, the plaintiff removed from Chicago to the city of Toronto, and there remained for about six months, after which he returned to the city of Chicago, where he has ever since resided. On the 28th day of August, 1903, the defendants commenced an action in the superior court of Spokane county to foreclose the above mortgage, and obtained service on the plaintiff herein by publication. A copy of the summons and complaint was mailed to the plaintiff at Toronto, Canada, as his last known post office address. A decree of foreclosure was thereafter entered and the property was sold on execution and bid in by the defendants. The present action was commenced on the 3d day of February, 1908, to vacate and set aside the decree of foreclosure and to redeem the property from the mortgage and foreclosure sale. This relief was sought upon the ground that the plaintiff herein was a resident of the city of Chicago at the time of the commencement of the fore-

closure action, and that his residence and post office address were well known to the defendants herein. On that issue the court below made the following findings, among others, and entered a decree in accordance with the prayer of the complaint:

"The plaintiff never was a resident of Toronto, Canada, with the exception of about six months in 1892, but for more than ten years prior to the commencement of said action, he was, and ever since has been and still is, a resident of the city of Chicago, state of Illinois.

"During the time between the execution of said mortgage by the plaintiff to the defendant and the attempted foreclosure thereof as hereinbefore set forth, and ever since said foreclosure the defendant I. N. Peyton well knew the residence and post office address of the plaintiff to be in the city of Chicago and state of Illinois.

"The plaintiff and defendant I. N. Peyton have been intimately acquainted with each other for many years, and at all times since the execution of said mortgage they have had occasional correspondence by mail with each other, and the defendant Peyton has on several occasions during said time met the plaintiff in the city of Chicago.

"The plaintiff had no knowledge whatever of the commencement of said foreclosure proceedings or of their pendency until the month of September, 1907, a short time prior to the commencement of this suit."

From this decree the defendants have appealed.

The testimony on the main issue in the case is in direct conflict. The respondent testified that he met the appellant I. N. Peyton in Chicago at different times after his return from Toronto, and before the mortgage foreclosure; that he received letters from Peyton addressed to the city of Chicago between these dates, and that he wrote a number of letters to Peyton from the city of Chicago to which he received no reply. The appellant Peyton, on the other hand, testified directly to the contrary, and while the extreme leniency extended to the respondent by the appellants during all these years rebuts any possible inference of a fraudulent intent on their part, yet we think the court was warranted in finding

from the testimony that the appellants knew, or by the exercise of reasonable diligence should have known, the residence and post office address of the respondent at the time of the commencement of the foreclosure suit, and in view of the conflict in the testimony and the superior opportunities afforded the trial judge for the ascertainment of truth, we must accept his conclusion as final.

The only remaining question in the case is the statute of limitations. The appellants contend that this was an action for relief on the ground of fraud, that the limitation for such action is three years, and that the present action was not commenced within the time limited by law. Conceding that the three-year limitation is applicable here, the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, and the testimony shows that the respondent had no notice of the judgment or sale until a few months prior to the commencement of the present action. Nor do we think that notice of the entry of the judgment should be imputed to him, especially in view of the fact that he met the appellant I. N. Peyton in the city of Chicago after the entry of the judgment, and the fact of the foreclosure of the mortgage was not disclosed to him, although the subject-matter of their conversation was the mortgage indebtedness and called for such a disclosure on his part. This meeting was denied by Peyton, but for reasons already stated we must accept the findings of the court below on this point also. It must be conceded that the respondent has been exceedingly dilatory and neglectful, but his equity in the mortgaged property could only be cut off by a legal foreclosure of the mortgage or by the statute of limitations, and for reasons already stated he is barred by neither.

The judgment is therefore affirmed.

RUDKIN, C. J., FULLERTON, PARKER, DUNBAR, MORRIS, and GOSE, JJ., concur.

[No. 8754. Department One. August 1, 1910.]

ROSCOE BRITTON, *by his Guardian Ad Litem, Sadie E. Fisler, Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.[1]

EVIDENCE—RES GESTAE—DECLARATION OF PARTY. Where, after a fall from a street car, a boy remained unconscious for eight days, his statement, made at once upon becoming conscious, that the conductor of the car kicked him off the steps, is admissible as part of the *res gestae*.

SAME. In such a case the fact that another witness stated that the boy was semi-conscious on the fifth or sixth day after the accident does not render the evidence inadmissible, but only affects its weight.

SAME—DECLARATIONS OF THIRD PERSONS. In an action for injuries to a boy alleged to have been kicked off the steps of a street car by the conductor after opening the door, the exclamation of a bystander "the boy is off," made as the conductor started to open the door, is admissible as part of the *res gestae*.

SAME—DISCRETION OF COURT. While a large discretion rests in the trial court as to the admission of declarations as part of the *res gestae*, it is prejudicial error where contradictory declarations forming part of the occurrence are admitted as to one litigant and denied as to another.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. Where the declaration of a bystander is ruled out as incompetent, and appellant states that it was part of the *res gestae* and reserves an exception, the point is preserved for review on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 13, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Post, Avery & Higgins, for appellant.

Plummer & Latimer, for respondent.

GOSE, J.—This is a suit to recover damages for personal injuries sustained by a minor. The fact asserted and relied

[1]Reported in 110 Pac. 20.

upon for a recovery is that Roscoe Britton, a minor thirteen years of age, was stealing a ride on the step of one of the defendant's street cars, and that the conductor opened the door of the vestibule and kicked him off, causing him serious injury. There was a verdict and judgment for the plaintiff. The defendant has appealed.

The admitted facts are, that the appellant, at the time of the happening of the accident, was a common carrier of passengers for hire, and operating electric cars in the city of Spokane; that the car upon which the accident occurred has a vestibule, opening on each side onto steps used by passengers in entering and leaving the car; that the left door is kept closed, and the right one open, when the car is in service, and that the boy was stealing a ride on the step on the closed side of the car at the time he sustained the injury. The appellant asserts that the boy fell from the step, whilst he insists that he was kicked off the car by the conductor. This was the chief issue at the trial. It is conceded that, immediately after the accident happened, the boy was taken to his home in an unconscious condition.

The boy and his mother, who is also his guardian *ad litem*, were permitted to testify, in substance, that the boy remained unconscious for a period of eight days, when he became conscious and at once stated to the mother than the conductor kicked him off the car. The appellant contends that this was error. We think the statement was a part of the *res gestae*. One exception to the rule excluding hearsay evidence is that, when something has occurred, startling enough to produce nervous excitement, spontaneous utterances of parties present are admissible in evidence as a part of the *res gestae*. It is not always necessary that the statement be made at the exact time that the shock occurs. The material inquiry always is, whether the statements offered as evidence were made at a time and under such circumstances as to induce the belief that they were not the result of reflection or premeditation.

They derive their admissibility and credibility purely from the circumstances out of which they arise.

"The utterance must have been before there has been time to contrive and misrepresent, *i. e.*, while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance." 3 Wigmore, Evidence, § 1750.

"There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the *res gestae* they cannot be admitted. And if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestae*." *Kennedy v. Rochester City & B. R. Co.*, 130 N. Y. 654, 29 N. E. 141.

"The time of the occurrence of the principal act is sometimes, by reason of some special circumstance, extended forward so as to make it coincident and connected with subsequent declarations by constructive continuity of time, as, for instance, when the party making the declarations having become unconscious at the very moment of the occurrence of the principal act, the declarations are made by him at the very moment of his regaining consciousness; under such conditions the act and the declarations are said to be simultaneous by relation, the declarations being spontaneous." 24 Am. & Eng. Ency. Law (2d ed.), p. 685.

See, also, *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593.

In the case last cited we said that it is not always essential that the declarations and principal occurrence shall concur in point of time, but that in many instances the fact that a considerable period of time has intervened does not destroy their admissibility as evidence. We further said that the circumstances of each case "should be carefully weighed by the trial judge in exercising his sound discretion." The controlling consideration in each case is, was the declaration a spontaneous, impulsive statement of a fact. If so, it is a part of the occurrence and is admissible. *Dixon v. Northern*

Pac. R. Co., 37 Wash. 310, 79 Pac. 943, 107 Am. St. 810, 68 L. R. A. 895. Tested by the principles we have stated, it is clear that the evidence was properly admitted. The declarations were made, as the witnesses assert, as soon as consciousness was restored. There had been no opportunity for reflection or deliberation. They were as much a part of the occurrence as if they had been made when the boy was raised from the street immediately after falling. So far as he was concerned, there was no conscious intervening time between the injury and the declaration.

The appellant criticizes the form of the questions, and urges that the evidence does not show that the statement was made as soon as the boy regained consciousness. We do not think a fair reading of the evidence warrants the criticism. The fact that Dr. Martin testified that the boy was semiconscious on the fifth or sixth day after the accident, does not make the declaration of the boy inadmissible. It goes to the weight, and not to the admissibility, of the declaration as evidence. But it is said: "If such evidence is admissible, then unscrupulous persons can dishonestly flood the record with evidence that can be neither combatted nor anticipated, for the sole purpose of mulcting a defendant in damages." The answer is that no rule of evidence has been formulated by man that can prevent perjury. Litigants must, in the last analysis, rely upon the justice and good sense of juries. The authorities cited by counsel from other jurisdictions need not be reviewed, as they are not in harmony with the view hitherto taken by this court.

One of the respondent's witnesses upon direct examination stated that, when the boy was observed riding upon the step, the conductor pulled the bell cord and started to open the door, when some one said, "The boy is off!" This statement was stricken on motion of the respondent. The boy testified that, when he got onto the step, the door was closed, and that the conductor opened the car door and kicked him off. The appellant insisted at the time the statement was stricken, and

insists here, that it was admissible as a part of the *res gestae*. The learned trial court, however, ruled that it was inadmissible. In this, we think, he committed prejudicial error. If the declaration of the boy is admissible as forming a part of the occurrence, as we have held, it would seem to follow that the exclamation of a bystander, contemporaneous with the occurrence, is also admissible. The exclamations of third parties present are as much a part of the *res gestae* as those of the parties themselves. 3 Wigmore, Evidence, § 1755; *Johnson v. St. Paul & W. Coal Co.*, 126 Wis. 492, 105 N. W. 1048; *Dale v. Colfax Consol. Coal. Co.*, 131 Iowa 67, 107 N. W. 1096; *Harrill v. South Carolina & G. E. R. Co.*, 132 N. C. 655, 44 S. E. 109; *Gulf, C. & S. F. R. Co. v. Tullis*, 41 Tex. Civ. App. 219, 91 S. W. 317; *Seawell v. Carolina Cent. R. Co.*, 133 N. C. 515, 45 S. E. 850; *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318; Wharton, Evidence, § 262; 24 Am. & Eng. Ency. Law (2d ed.), 685-6.

Johnson v. St. Paul & W. Coal Co. was an action to recover damages for personal injuries. The plaintiff, a hatch tender, alleged that he was struck by a sheave hook used to lower coal buckets into the vessel. A witness, having testified that he saw the boy fall, was permitted to state that a moment later he heard some one say: "The hook hit him!" The court said that the exclamation was clearly a part of the *res gestae*. In *Dale v. Colfax Consol. Coal Co.*, the plaintiff, a brakeman, attempting to alight to make a coupling, fell to the track and was run over by the car on which he had been riding. The negligence charged was that the defendant's employees failed to stop the train after they knew of the plaintiff's peril. It was held, as bearing on the question whether the conductor had actual knowledge of the plaintiff's situation, that the statements of persons on the car in the presence of the conductor, and their acts within the scope of his observation, could be shown as tending to establish his actual knowledge.

In *Harrill v. South Carolina & G. E. R. Co.*, a personal

injury suit, the deceased was killed, while moving an engine over a bridge, by the falling of the bridge. The engine had crossed that part of the bridge over the water and had reached the trestle on the ground, when bystanders exclaimed: "Jake is safe!" The trestle suddenly gave way, and the engine and tender were thrown back and fell into the water. It was held that the exclamations were competent evidence, going to show the dangerous condition of the bridge, the peril of crossing, and the effect the effort to cross had on the bystanders.

In *Walters v. Spokane International R. Co.*, *supra*, we held that there was a large discretion in the trial judge in receiving and rejecting evidence of this nature. A due regard for the administration of justice, however, forbids that declarations forming a part of the occurrence out of which the cause of action springs shall be admitted as to one litigant and denied as to another. The exclamation was so clearly a part of the *res gestae*, and so vitally affected the issue to which it referred, that its rejection was highly prejudicial. The respondent relies upon *Dixon v. Northern Pac. R. Co.*, *supra*. In that case it was said that "there is no showing that the stranger who was not able to be found at the trial was in any way connected with the accident." In the case at bar the evidence shows that there were passengers upon the car who were not produced as witnesses. The exclamation, "The boy is off!" shows that it was made under the pressure of excitement, and that it was the spontaneous, impulsive statement of one who believed that it expressed the truth.

The respondent asserts that the question is not properly before us, for the reason that the statement was not responsive to the question propounded to the witness. The record, however, shows that the appellant's counsel stated to the court that the exclamation was a part of the *res gestae*, and reserved his exception to the ruling. Neither the objection to the statement nor the ruling of the court was placed upon

the technical ground that the answer was not responsive to the question, but upon the broad ground that it was not competent. The appellant was not required to pursue the matter.

The judgment is reversed.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

[No. 8836. Department One. August 1, 1910.]

MARGARET C. ENGELKING, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF NATURAL LAWS—EXTRAORDINARY DANGER—EVIDENCE—QUESTION FOR JURY. Common laborers were not guilty of contributory negligence and did not assume the risk, as a matter of law, in attempting to float a raft under a new city bridge to remove the false work, where it appears that they were instructed to construct the raft, to be secured by a two-inch cable to a railroad bridge 200 feet above, and float in down to an end arch of the new bridge, that the raft was carried up and out to the center of the stream by an eddy, and the strength of the current on the cable was sufficient to pull down and submerge the raft with the men upon it, until it could no longer be held; nor can it be said that they had knowledge of and were bound by natural laws, since they were not so obvious as to prompt the instinct of self-preservation, and the dangers were extraordinary and not likely to be appreciated.

SAME—NEGLIGENCE OF MASTER—DUTY OF SUPERINTENDENCE—EXTRAORDINARY HAZARDS. In such a case the extraordinary hazard created by the weight of the raft—8,000 of 9,000 pounds—the heavy rope, the current of the stream, and the proximity of the falls, placed upon the city an imperative duty of superintendence over common laborers engaged in floating the raft into position under the bridge, for the want of which the city would be liable.

APPEAL—REVIEW—INSTRUCTIONS—HARMLESS ERROR—MASTER AND SERVANT—ASSUMPTION OF RISK. An instruction to the effect that a servant assumes ordinary risks, "provided the master has used ordinary diligence to eliminate them" is not necessarily prejudicial

[1]Reported in 110 Pac. 25.

where it did not stand alone, and in a number of other instructions the law of assumption of risk is clearly set forth so that the jury could not have been misled.

MUNICIPAL CORPORATIONS—STREETS—BRIDGES—LIABILITY FOR NEGLIGENCE. The construction of a bridge across a stream is a ministerial rather than a governmental function, for which a city is answerable to its employees for its negligence.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 13, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the wrongful death of an employee. Affirmed.

E. O. Connor and *Danson & Williams*, for appellant.

Robertson & Miller and *Harry Rosenhaupt*, for respondent.

CHADWICK, J.—At the time of his death, H. W. Engelking was a common laborer in the employ of the city of Spokane. The city was engaged in erecting a concrete bridge over the Spokane river, a short distance above the falls. The bridge had been so far completed as to warrant the removal of the false work sustaining the arches, of which there were several. High water had taken out the false work from under the second arch, and the wooden forms had been moored by cables to the Great Northern railway bridge, a structure which paralleled the city bridge about two hundred feet up the stream and to the east. These forms were lying near the shore, with the bow of the arch to the center of the stream. In consequence, the flow of the current along the shore line was naturally deflected toward the center arch of the city bridge. A few feet below the concrete structure, a temporary bridge had been erected. A part of this had gone out a short time before, but it was in place below the south arch, so that anything floating under the south arch would lodge against it and be thus prevented from being carried over the falls.

Engelking and four others were directed by the foreman in charge for the city to take some timbers then at hand and

make a raft, to be floated down under the south arch and upon which they could stand while removing the false work. No further direction or superintendence was given or had over the men, although one of their number "seemed to take the lead." Accordingly the men took eight sticks, ten by ten, with cross-pieces leaving a space between each two of them, so that when the framework was completed the raft was about fourteen feet wide and twenty feet long. Upon this they erected a superstructure to bring them within reach of the top of the arch. When the raft had been completed it is estimated that it weighed from eight to nine thousand pounds. Between the moored arches and the south span of the bridge, there was an eddy in the stream. In this, and about thirty or forty feet above the city bridge, the raft was moored, that point being also about sixty or sixty-five feet south of the pier upon which the center and south arches centered. The raft had been let down into the eddy and was secured by a long rope, two inches in diameter, attached to the Great Northern bridge, about seventy-five feet from the shore. Other ropes were attached to the raft. There is testimony going to show that one of these should have been used as a guy rope, to be held or tied on the shore while the raft was let down under the arch; while the other was to be used in securing the raft to the bridge. On the other hand, there is testimony showing that the large cable was alone depended on to let the raft down, while both of the smaller ropes were intended to secure the raft to the bridge when in proper position. The jury having found for plaintiff, we shall accept her theory as the true fact in the case.

When all was done, one of the workmen crossed the river to get some tools. Another went up to the Great Northern bridge to man the cable, the end of which was wrapped around a batter post on the Great Northern bridge. While the workman was going up the bank of the stream to man the cable, the rope which snubbed the raft to the shore was cut loose, so that when he first observed the raft after reach-

ing his post, it was drifting up and out into the stream, carried up on the eddying waters, and out by the long sweep of the two hundred and forty-foot cable, the most of which was submerged and a part of which had been struck by the main current of the stream. The cable described a sweep or curve so that, at some time the segment of the curve must have been below or to the west of the upper end of the raft. Whether Engelking and one of his companions pushed the raft out with pike poles is a disputed fact, but not material as we view the case. As the raft caught the swift current, the force of the current fell upon the cable, drifted the raft rapidly out to the center and, as soon as the cable straightened out, pulled it under the surface. Those on the raft having no means of controlling it, the workman on the bridge was signalled to let out more rope, and when he did so the raft rose to the surface, but when the rope came taut the raft was again pulled under the water, this time about two and one-half or three feet, or to the waist line of the men thereon. This continued until the workmen could no longer hold the rope, and the raft, being then opposite and almost under the center arch, was carried through it and over the falls. One of the workmen escaped and was a witness at the trial. The other two lost their lives. This action is prosecuted by the widow of Engelking, and from a judgment in her favor, the city has appealed.

Counsel for appellant has aptly summarized the theories upon which a recovery was sought and must rest if sustained. He says:

"(1) That these 10x10 timbers, forming the foundations of the raft, had, a month previous, been green timbers, and had, during the month preceding, been lying in the water. (2) That the rope by which the raft was moored to the Great Northern bridge was too heavy. (3) That there was no foreman over these men and in charge of the construction of the raft."

The first two grounds may be summarily disposed of. It

may be conceded—for the testimony shows—that the raft and the rope would, under ordinary conditions, or under the anticipated conditions—that is, if the raft had been floated under and moored beneath the south arch—have been a sufficient and proper appliance. The scheme failed because the workmen did not appreciate the danger arising from the submerged cable, the rapid flow, and conflicting currents of the stream which carried the raft beyond the south arch and opposite the center arch, and the further fact that the strength of the current was sufficient to pull the raft under the water when its weight came squarely upon the rope.

It is argued that these things resulted because of natural laws known to all, and that, by an exercise of the faculties with which all men are endowed, the danger would have been foreseen and avoided. *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867, and *Cavaness v. Morgan Lumber Co.*, 50 Wash. 232, 96 Pac. 1084, are cited to sustain this contention. Notwithstanding the forceful argument of counsel, the cases cited cannot be made to apply here. The workmen were directed to meet, not an ordinary, but an extraordinary condition. 1 Labatt, Master & Servant, 240; *Anderson v. Columbia Imp. Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840. It is true that, as viewed by learned counsel and by those versed in the laws of mechanics, the result might have been expected as a consequence of the violation of natural laws. But it is not to be expected that a common laborer will have knowledge of, or be bound by, natural laws, unless they are so obvious as to prompt the instinct of self-preservation in men of ordinary prudence and understanding. The wonders of this age of invention come from the application of natural laws. The touch of genius rather than the strength of reason has unlocked their mysteries, so that even learned men could not be charged with knowledge of them. Men are not bound to observe or act upon natural laws unless they are within the range of common understanding. That four men

acting in harmony having no understanding that the cross currents and torrential flow of the stream striking against a two-inch cable would overcome the natural law which held the raft in its place before it was pushed out into the stream, is the best evidence that they are not to be charged with the assumption of risk or contributory negligence as a matter of law; for, if they knew or appreciated the danger, the instinct of self-preservation, which is the first law of nature, would have restrained them. In any event, it is a question upon which the minds of reasonable men may differ, and the jury having found by special verdict that Engelking and his companions did not appreciate the danger, satisfies us that he was not guilty of assumption of risk or of contributory negligence.

The weight of the raft, the heavy rope, the current of the stream, and the proximity of the falls, made the superintendence of a qualified person an imperative necessity. In *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376, we held that the business of loading a schooner with lumber could not be carried on without superintendence. While this case is not in point upon the fact, it nevertheless furnishes a source from which the legal conclusion may be drawn that the duty of superintendence is not a fixed legal duty, but may arise from the facts of any given case. In that case the servant was entitled to the immediate and watchful care of one who could warn him against dangers that he could not foresee. In this, the servant was entitled to the superintendence and direction of a skilled person, so that dangers which would not be foreseen by a person of only common understanding might be avoided. The hazard was extraordinary.

"When the servant is thus required to work amidst new surroundings or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risks, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself." Labatt, Master & Servant, p. 541.

"It is the duty of the master to supervise, direct and control the operation and management of his business so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor." Thompson, Negligence, § 3805.

That it is the ordinary and not the extraordinary danger, arising from the violation of some rule of science or mechanics not likely to be appreciated by the man of ordinary prudence, which binds the servant to the law of assumption of risk is the logic of *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189, where the court said:

"The rule undoubtedly is that a servant assumes the risk of injury from dangers incident to his employment which are apparent to him and which the master does not undertake to remedy as an inducement to keep the servant at work, or is under no duty of positive law to discover and remedy. But this doctrine, it seems to us, has no application to the case before us. Here, clearly, the danger causing the injury was not one ordinarily incident to the employment. On the contrary, if the respondent's evidence is to be believed, the injury was caused by the grossest kind of negligence on the part of the appellant's foreman who was in immediate charge of the work. He directed a thing to be done which the slightest investigation must have told him would be highly dangerous to both of the men who were engaged in work at the foot of the trestle. The tightening of the rope, in the position it was placed by his orders, must necessarily throw off the planking from the projecting timbers, and it was gross carelessness to do this without warning the men below of their danger. This danger was not, therefore, a danger incident to the employment. It was one caused by the negligent acts of the appellant's foreman, and one which he could have avoided by using even ordinary prudence."

Many cases are cited by counsel on both sides, but, inasmuch as this case depends upon general and obvious rules of law, it would extend our opinion to an inordinate length to review them.

Among other instructions complained of, the following is vigorously assailed:

"The law also provides that the servant is held to assume the ordinary risks usually incident to his employment so far as they may fairly be presumed to be within his knowledge in the exercise of ordinary care, *provided the master has used ordinary diligence to eliminate them.*"

It is insisted that the italicized part denies to appellant its defense of assumption of risk. We are not advised as to the theory of the court in injecting the words objected to, and if this instruction stood alone it might not be sufficient for the guidance of the jury. Its meaning is not plain, but in other instructions, not in one but in a number, the law of assumption of risk is clearly set forth, so that upon the entire charge the jury could not have been misled. The verdict being consistent with the evidence, we had rather believe that the jury followed the true rule, emphasized as it was by the repeated utterances of the court, than that it was governed entirely by what seems to us to be a misprision on the part of the court. *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423. Objections are made to other instructions, but we think they state the law when considered in connection with other instructions, and are consistent with the law of the case as we have found it to be.

Lastly, it is contended that the city cannot be held liable because it was acting in a governmental capacity, and not in the capacity of a private corporation. While there is a diversity of opinion and a divided authority upon this question, it seems to have been settled in this state that the construction and repair of highways is to be regarded as a ministerial rather than a governmental function, and that the city is therefore answerable for its negligence. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Prather v. Spokane*, 29 Wash. 549, 70 Pac. 55, 92 Am. St. 923, 59 L. R. A. 346. In *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629; *Id.*, 42 Wash. 134, 84 Pac. 641, the case upon which appellant principally relies, the distinction between that case and the case at bar is noted by a quotation from *Sutton v. Snohomish:*

"In the first place, we are of the opinion that the laying out, repairing and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. In the performance of such duties, however imposed, the municipality acts primarily for the benefit of the inhabitants of the particular locality. In preserving the peace, caring for the poor, preventing the destruction of property by fire, and preserving the public health, it assumes duties which are said to be in their nature solely governmental (Jones on Negligence of Municipal Corporations, ch. IV), and for the nonexercise, or negligent exercise, of which the corporation is not generally liable to individual citizens. But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby. *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705.".

Whether the reasoning employed to draw the distinctions between the *Sutton* case and the case of *Cunningham* be good or bad, it is the established law in this state, and we are not disposed to question it in the absence of legislative direction. This conclusion makes it unnecessary for us to notice specifically other assignments of error, they being covered by the general propositions advanced.

The judgment of the lower court is affirmed.

RUDKIN, C. J., GOSE, and FULLERTON, JJ., concur.

[No. 8527. Department Two. August 4, 1910.]

STANDARD FURNITURE HOUSE, *Appellant*, v. MRS. M. A. BURROWS, *Respondent*.[1]

REPLEVIN—RELIEF—PLEADING—COURTS — JURISDICTION. In an action of replevin to recover property sold conditionally, upon which plaintiff claimed a default and a balance due, the court, upon finding a sum due less than the amount claimed, has jurisdiction to decree the usual judgment in replevin in favor of the plaintiff, unless the defendant, within ten days, pays the amount found to be due, with costs and attorney's fees, although the payments made and the balance found did not equal the contract price of the goods sold; especially where the real controversy was over the amount due, if any, and whether the property sold had all been delivered; since property sold conditionally is held only for security, and the relief granted was equitable, and the court may grant any relief consistent with the case made by the pleadings.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered June 22, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

Smith & Mack, for appellant.

Birdseye & Smith, for respondent.

DUNBAR, J.—The plaintiff and defendant entered into a certain conditional sale contract for certain personal property delivered by the plaintiff to the defendant. The contract provides that the title shall remain in the plaintiff until the full amount agreed to be paid therefor shall have been paid, stating the dates and amounts of payments. The agreed value of the property was $507. A failure to make a certain payment resulted in the bringing of this action to recover the property, and the property in the complaint was alleged to be of the value of $250. An affidavit in replevin was executed, and a bond given. The defendant, to retain the property, gave a redelivery bond, and kept the same.

[1]Reported in 110 Pac. 13.

The defendant then answered, admitting the conditional sale contract, but alleging full compensation thereunder; admitted the demand of plaintiff for the property; and by way of counterclaim, alleged that the plaintiff was indebted to the defendant in the sum of $41.65. Upon these issues the case was tried. The complaint alleged that the plaintiff had paid on the contract the sum of $355.95, and prayed for a judgment for the possession of the property or for the value of the same, and for costs and attorney's fees.

The court found, among other things, the execution of the instrument as alleged; the value of the property to be $250; that the defendant had failed to make the payments at the time and in the amounts provided in said conditional sale contract; that at the time of the commencement of the action there was due and owing to the plaintiff by the defendant, on the purchase price of the property, the sum of $79.80; that the plaintiff was the owner of, and legally, lawfully, and rightfully entitled to the immediate possession of, the property, and in the event said property could not be delivered, said plaintiff was entitled to a judgment against defendant in the sum of $250; that the plaintiff was entitled to the sum of $25 attorney's fees, and to recover all its costs and disbursements in the action, the fourth finding being that, in the event that she should within ten days pay into court the sum of $79.80, and all costs of the action and $25 attorney's fees, the defendant should be entitled to retain and keep the property described in the complaint; and judgment was entered in accordance with such finding. To this finding an objection was taken, and it is assigned as error here, the contention of the appellant being, in effect, that the court was without jurisdiction to make such finding or render such judgment: that all that it could do was to give a judgment for the return of the property or its value.

There is no statement of facts brought here from which this court can determine the cause of these seemingly inconsistent findings. But from an examination of the pleadings

in the case, we are of the opinion that the court did not go beyond its jurisdiction in making the ruling complained of; for, from the complaint, answer, and reply, it is evident that the real contention was not over the title of the property, as is generally the case in actions in replevin pure and simple, but over the amount that was actually paid, and as to whether a portion of the articles described in the agreement had actually been delivered to the defendant. The court must have found that the full amount demanded by the complaint was not justified, for the complaint alleged, in substance, that the defendant had failed in payments to the extent that she had only paid $355.95 on the agreement to pay $507, which would leave a deficiency of $151.05. The court found that the defendant was in default $79.80, so that it is evident that the plaintiff was demanding $71.25 more than it was entitled to; and the real controversy under the pleadings in this case was over the amount due, if any, under this contract. If appellant's theory of the law is correct, it would be unsafe for a defendant in an action of this kind to challenge the correctness of the plaintiff's demands, for fear that a failure to substantiate its own claim in every particular would result in working a forfeiture of all that had been paid. It is hardly necessary to assert the oft-repeated statement that forfeitures are abhorrent to the law, and will not be declared if there is any other reasonable theory upon which the case can be settled.

Again, under the ordinary rules of pleading, where there is an answer to a complaint, and issues joined, the court has jurisdiction to enter any judgment and give any relief consistent with the case made by the pleadings. In these conditional sales, the title is held only for security, and when that is accomplished and the vendor gets the whole amount due and costs expended in its recovery, he has certainly recovered all the damages that have resulted from a breach of the contract. This is the equitable doctrine which is supported by a great majority of the adjudicated cases. In

Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682, certain personal property was sold by the plaintiff to the defendant, and the following provision was in what was termed a lease:

"But upon any breach of the provisions of this lease, especially upon failure by the said lessee to pay the several obligations, or either of them, as they become due and payable, then this lease, and any and all claim or right on the part of said lessee under the same, or to further use and possession of said property, shall be thereby terminated, and the said A. D. Puffer & Sons Mnfg. Co. may thereafter, at any time, enter the premises where said property may be, and resume possession of the same, without process of law, or let or hindrance, ..."

In deciding the case, it was said:

"To permit the so-called 'lessor' to resume possession of the property, and declare all payments forfeited, when perhaps all but one may have been paid, is contrary to the fundamental principles observed in courts of equity;"

stating that, among the very few cases which might be considered as holding or intimating a contrary opinion is one from their own court, but distinguishing that case and finally concluding: "But if that is a just construction of the language used, the decision does not meet with our concurrence."

The same equitable doctrine has been announced by this court in *National Cash Register Co. v. Petsas*, 43 Wash. 376, 86 Pac. 662. There there was some agreement about turning in an old register on payment for the new, and receiving a credit of $43.75 therefor. This court, in speaking on that subject, said:

"In other words, respondent had the privilege of paying $43.75 by delivering the old register to appellant. He never made said payment. Consequently full payment for the new register has never been made. Said written order or agreement provided that the title to the new register should not pass until the purchase price should be paid in full. Said purchase price not having been paid, appellant was justified in bringing this action."

This is exactly a parallel case with the one at bar. According to the finding of the court, all the purchase price had not been paid, and the appellant in this case, as in that, was justified in bringing the action. But this court continued:

"The judgment of the honorable superior court is reversed, and the cause remanded to the trial court with instructions to grant judgment for the recovery of the new cash register, together with damages for its being withheld, unless within thirty days from the filing of the remittitur in the lower court the respondent shall deliver to appellant the old cash register in as good a condition as it was at the time of the commencement of this action, or to pay to the appellant the sum of $43.75 with legal interest thereon from the date of the commencement of this action."

To the same effect is *National Cash Register Co. v. Wapples*, 52 Wash. 657, 101 Pac. 227. Again, the controversy came up over the turning in as part payment of an old cash register at a certain given price, and this court said:

"In this case the installments were past due. None of the payments had been made at maturity, except the payments made at the time of delivery. All the subsequent payments were made after maturity. The vendee was in arrears with his payments, but he was not in default. And if he was in default, such default was waived by the vendor because no demand had been made for the property. The vendee might at any time, even after an action in claim and delivery was begun, pay the whole amount due with interest and costs, and acquire an absolute title."

See, also, *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835.

An equitable judgment, which was warranted under the pleadings, was rendered in this case, and the same will be affirmed.

RUDKIN, C. J., MOUNT, PARKER, and CROW, JJ., concur.

[No. 8663. Department Two. August 5, 1910.]

NATIONAL BANK OF COMMERCE, *Plaintiff*, v. L. KILSHEIMER & COMPANY, INCORPORATED, *et al.*, *Defendants*, ELMORE WINKLER, *as Receiver*, *Respondent*, J. ARONSON, *Appellant*.[1]

APPEAL—PARTIES ENTITLED TO APPEAL—MISTAKES. A party cannot appeal from a final order confirming a receiver's sale, on account of a mistake made in entering it, without first calling the trial court's attention to the mistake.

JUDGMENTS—VACATION—GROUNDS—MISTAKE. Rem. & Bal. Code, § 464, subd. 3, authorizing the vacation of judgments or orders for "mistakes, neglect, or omission of the clerk, or irregularity" etc., is not restricted to mistakes of the clerk, but refers to any mistake; and under this section and § 303, Id., authorizing the court in the furtherance of justice to correct a mistake in any pleading or proceeding, it is the duty of the court to correct a mistake made by counsel in entering an order confirming a receiver's sale, so that the same will conform to the order and notice of sale.

RECEIVERS—SALES—CONFIRMATION—CORRECTION OF MISTAKE. Where an order for a receiver's sale provided that the purchaser should receive credit proportionately to the total value of the goods originally listed which had been disposed of between the filing of the inventory and the sale, an order of confirmation giving him credit for the total value at list prices of all goods *now* in the store (except those purchased by the receiver since the inventory), is clearly a mistake and it is the duty of the trial court to correct the same so that he will receive credit only for those *not* now in the store.

SAME—PARTIES—ASSIGNEE OF PURCHASER. Upon motion to correct an order of confirmation of a receiver's sale, a person recited in the order of confirmation to be the assignee of the purchasers stands in the place of the purchasers.

Appeal from an order of the superior court for King county, Gilliam, J., entered November 1, 1909, modifying an order confirming a receiver's sale, after a hearing before the court. Affirmed.

[1]Reported in 110 Pac. 15.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellant.

R. E. Thompson, Jr., for respondent.

DUNBAR, J.—On the 9th day of June, 1909, Elmore Winkler, the respondent in this case, was appointed receiver of the defendant corporation, took charge of the assets, filed an inventory on the 28th day of June, 1909, and carried on the business of the defendant corporation, retailing liquors, cigars, and cigarettes, until the time of the sale hereinafter mentioned. On the 2d day of July, 1909, he petitioned the court for permission to sell the balance of the stock of defendant corporation, together with the fixtures, etc., and an order was made authorizing the receiver to sell in bulk, and fixing the time of sale. The receiver advertised for bids on said stock and fixtures, to be opened on the 12th day of July, 1909. On said 12th day of July, the receiver received five bids for said stock, of which that of Max M. Pullman and Hyman N. Krasnoff for $5,000 was the highest, and on the 13th of July the receiver made his return of sale to the court, and recommended the acceptance of the Pullman-Krasnoff bid. In the meantime negotiations were opened between the high bidders for the stock and one J. Aronson, providing said bid was accepted and the sale confirmed. On the 16th day of July, 1909, an order was made confirming the sale, and directing the receiver to sell and convey to Aronson the stock, etc., and Aronson paid to Pullman and Krasnoff the sum agreed upon between them as the purchase price of their rights under their bid. Such rights were assigned to him.

The original order of sale, while not in so many words specifying the condition of sale, is plainly construed to mean that the purchaser should receive credit proportionately to the total value of the goods originally listed in the inventory which had been disposed of between the filing of the inventory and the sale, the confirmation of which was asked. The receiver recommended the confirmation of the sale, and on the

16th day of July, 1909, the receiver and his attorney, and Pullman, Krasnoff and their attorneys being present, the attorney for the appellant, having prepared an order of confirmation, handed it to the attorney for the respondent herein for inspection. It was hastily inspected, according to the testimony of respondent's attorney, and handed up to the court, who adopted it in his order of confirmation. In that order of confirmation were the following words:

"Less deductions and additions to be determined as follows: less the total value according to the prices at which they were appraised, of such goods originally listed in the inventory and appraisement filed June 28, 1909, which are now contained in the store of defendant corporation, plus the value according to the original value of such goods as are now contained in said store which were purchased by the receiver since the taking of the inventory."

Shortly after the filing of this order of confirmation by the attorney for respondent, he discovered that the stock had not been sold in conformity with the order of sale made by the court, which order was substantially set forth in the notice of sale which had been published, and informed the attorney for the appellant that he should ask the court to vacate the order of confirmation and have it made in conformity to the order of sale. The attorneys not being able to agree on this proposition, a petition was filed, asking the court to vacate the order of confirmation. Issues were made, and the cause was tried, and the court modified the order to correspond with the order of sale and notice of sale by deductions and additions, to be determined as follows:

"Less the proportionate value of said goods originally listed in the inventory filed herein June 28, 1909, which are not now contained in the store of the defendant corporation, and plus the proportionate value of such new goods as are now contained in said store which were purchased by the receiver, such proportion shall be determined by the ratio which the amount of the bid bears to the value of the property sold, such value being fixed by the inventory in the case of old

goods and by the cost price in the case of goods purchased by the receiver since taking the original inventory."

We should have stated that the petition for modification shows that, under the conditions as expressed in the confirmation as amended, Aronson, the appellant, was indebted to the estate in the sum of $1,189.78, which was the amount which really was due if computed according to the terms of the last order confirming the sale, and the order of the court commanded him to pay that amount. From this order this appeal is taken.

It is not contended by the appellant that the order of confirmation was, in truth and in fact, in accordance with the order of sale, but his contention is that the court erred in assuming jurisdiction to modify the order of July 16; that, even had the court possessed jurisdiction to amend its former order, it was error for it to do so upon the facts in this case. It is insisted that the order of confirmation was a final order, and as such could have been reviewed by appeal, and that, that being so, the court had no jurisdiction to modify or vacate the order on petition. The order of confirmation was a final order in a sense, but it could not have been reviewed by appeal by the respondent without calling the mistake, which he claimed had been made in making the order of confirmation, to the attention of the court. He did call it to the attention of the court by petition, and his petition was granted. So that still he was powerless to prosecute any appeal in the case, for the reason that the judgment of the court was in his favor. If the petition had been denied, then it may be that the judgment of the court in refusing to grant a modification might have been appealed from. But under the circumstances of the case, all the appeal that was available was the appeal on the part of the appellant which he has prosecuted. Many cases are cited by the appellant to sustain his contention that the superior court has no jurisdiction to vacate or modify a final judgment or order, except for the reasons and within the time prescribed by the statute.

But these cases, as we view the law, are not in point in this case.

Chapter 17, page 407, 1 Rem. & Bal. Code, on the subject of vacation and modification of judgments, and prescribing the powers of the superior court to vacate or modify judgments or orders, prescribes that such order may be vacated or modified, in § 464, subdivision 3, as follows: "For mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order." The appellant contends that it is only mistakes of the clerk that are contemplated by this statute; and that, as there is no neglect or mistake imputed to the clerk in this case, no provision is made for vacation or modification of the judgment. But we think this is not the proper construction or interpretation of the language used by the statute. It provides for modification for mistakes —that is one ground for the modification; and we have no idea that it was the intention of the legislature to so narrowly restrict the words "mistakes or neglect" as to make them apply only to mistakes or neglect of the clerk, but that they were to apply to any mistake or any neglect which in the judgment of the court would warrant a modification of the judgment in the furtherance of justice. Section 303 of the same volume says that the court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect. Under this provision of the statute, we think the court had authority to modify the order of confirmation. In addition to these statutory provisions, it was decided by this court in *O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 Pac. 241, that the superior court has inherent power to modify a judgment entry to make it conform to the truth, independent of any statute; that it is not material under what statute the party seeks the review, and that it is not even a matter of discretion

with the court, but that it is an imperative duty when no innocent third person will suffer thereby.

On the other proposition, that under the circumstances of this case, it was error for the court to modify the judgment even if it had possessed jurisdiction to review its former order, we can arrive at but one conclusion. Under the construction placed upon the language of the first order by the attorneys for appellant, an estate could be actually destroyed, as is very pertinently illustrated by the attorneys in this case: If the estate had been originally worth $10,000, and $5,000 worth of property had been sold by the receiver before the receiver's sale, and there was $5,000 left to be turned over to the purchaser, the purchaser would receive the $5,000 worth of goods, and take credit for $5,000 that had been sold, with the result that he would get the $5,000 worth of goods for nothing. And to show how ridiculous the contention is, if perchance there had been $11,000 worth of goods, and $6,000 sold, and $5,000 delivered to the purchaser, he would not only get the $5,000 worth of goods for nothing, but would be entitled to a judgment against the estate for an additional $1,000.

There is a contention that, even though this might be true with relation to the first bidders, it could not apply to the appellant in this case, for the reason that he purchased these goods of the original bidders after the confirmation by the court, but this contention is not sustained by the record, the order of confirmation itself setting forth the fact that the bidders had assigned and transferred all their interest in said bid to J. Aronson, Aronson thereby being substituted in their place as the purchaser.

No error was committed by the court in any respect, and the judgment will be affirmed.

RUDKIN, C. J., PARKER, CROW, and MOUNT, JJ., concur.

[No. 8740. Department Two. August 5, 1910.]

WILLIAM J. BEST *et al.*, *Respondents*, v. JAMES W. OFFIELD *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—RESCISSION—FRAUD. The purchasers of an orchard are entitled to a rescission of the contract for fraud by the vendor in representing that it contained 70 acres in orchard when it contained less than fifty acres, and it appears that the area in orchard was very difficult of determination except by an accurate survey, that the vendors were or should have been familiar with the facts, having worked the farm for thirty years, while the purchasers relied on the representations, were entirely unfamiliar with the fruit business, and sought a rescission as soon as they suspected and ascertained the truth.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered October 26, 1909, upon findings in favor of the plaintiffs, after a trial before the court and a jury, in an action to rescind a contract. Affirmed.

Cain & Hurspool, for appellants.

Skuse & Morrill, for respondents.

DUNBAR, J.—This is an action by William J. Best and wife, for the rescission, for fraudulent misrepresentation, of a contract of sale whereby plaintiffs agreed to purchase, and the defendants J. W. Offield and wife agreed to sell, a certain orchard and land in Garfield county, Washington; the plaintiffs seeking to recover the amount of the purchase money already paid, together with expenses incurred in connection with the purchase and expenditures made upon the land while they were in possession. The misrepresentations set up in the complaint and relied on at the trial were: (1) misrepresentations as to the amount of land, in the different varieties of fruit in the orchard as a whole, and the amount of land in cultivation outside of the orchard; (2) misrepresentations as to the quality of fruit grown in the orchard; (3) misrep-

[1]Reported in 110 Pac. 17.

resentations as to the whole number of acres of fruit embraced in the orchard; (4) misrepresentations as to the sufficiency of water for irrigation; and (5) misrepresentations as to the amount and character of the personal property included in the transaction. The defendants answered, denying the making of the misrepresentations alleged, setting up the fact that the plaintiffs inspected the orchard, made outside inquiries, and relied on their own judgment in making the purchase; and asking for a forfeiture of the contract of sale, on the ground that plaintiffs had failed to make the second payment under the contract, and had abandoned the land; and for damages for negligence and carelessness in pruning the vineyard and orchard. The case was tried to a jury on questions of fact. Certain special interrogatories were submitted to the jury, which, with the answers thereto, were as follows:

"(1) Did the defendants James W. Offield and Nettie Offield, or either of them, at or before the making of the contract in question, make the plaintiffs, or either of them, any positive statements by which they, or either of them, materially misrepresented to the plaintiffs the true facts regarding the lands, premises and property which was the subject of the contract in question? Answer: Yes.

"(2) How much expense did the plaintiffs incur in caring for and making improvements upon said land and premises, and in caring for and feeding the stock while in possession thereof? A. $416.70.

"(3) Were the plaintiffs, William J. Best and Emma L. Best negligent in the care of said premises during the time they were in possession of the same and, if so, how much were defendants damaged thereby? A. None."

The court adopted the findings of the jury, and found that James W. Offield made representations to the plaintiffs in regard to material facts concerning the lands and premises which are the subject of the agreement in question, to wit, among other things, in regard to the number of acres thereof growing to fruit and grapes, which were false; that such representations were known by defendants to be false when

made, and were so made by said defendant to induce plaintiffs to enter into said agreement; that the plaintiffs in acting on said representations were ignorant of the falsity of the said representations, and reasonably believed them to be true; that the plaintiffs had expended $416.70 in the care of the farm; that they were not negligent in the care of said premises and property during the time they were in possession of the same; that the defendants did not suffer any damages therefrom; that plaintiffs were not familiar with fruit growing, or with fruit trees, or with the kind of property which was the subject of the agreement in question; that this was known to the defendants during the time the negotiations were pending, and that as soon as plaintiffs ascertained that the representations made to them were false, they served notice upon the defendants of the rescission of the contract. Upon these findings, conclusions of law were found, and judgment was entered in favor of the plaintiffs for recovery of the money paid, for a rescission of the contract, for the sum of $416.70 with interest from and since the 1st day of March, 1909, and for costs. From this judgment, this appeal is taken.

The testimony shows, that the plaintiff William J. Best examined this farm in September; that at that time he stayed upon the farm about two days, in company with the defendant James W. Offield; that a great deal of the time it was raining hard, so that it was difficult to get around on the premises; that between that time and before the final execution of the contract, Emma L. Best visited the farm, her testimony being that she stayed there two days, and other testimony of the defendants being to the effect that she was there some days longer; that the contract was finally entered into in November, and that the parties plaintiff took possession of the farm about the 25th of November, and proceeded to go to work upon the orchard; that some time after taking possession, the plaintiffs began to suspect that misrepresentations had been made as to the number of acres em-

braced in the orchard, as to the quality of fruit trees, and as to the alleged representations that there was sufficient water to irrigate the premises; that in February, so strong had this conviction grown, that William J. Best, aided by an employee, undertook to survey the orchard by using a rude pole of some kind, and from such survey became satisfied that there was not the amount of land in orchard that had been represented, and gave notice to the defendants that he would rescind the contract; that subsequently to this and prior to the trial of the action, a survey was made under the supervision of a competent surveyor, and it was ascertained and proven, we think beyond a question, that the amount of land in controversy instead of being seventy acres, was in reality 48.41 acres, which included the grapes and the orchard generally.

Without reviewing in detail this testimony which we have particularly examined, we are satisfied that the special findings of the jury were justified, and that the findings made by the court were justified by the testimony; that, to say nothing of the representations concerning the quantity of water available for irrigation, and the quality of the trees, it was represented to the plaintiffs that there were seventy acres set out in orchard, and that they acted on this representation. This is positively sworn to by the plaintiffs and other witnesses who were present at the time the representations were made, and is in reality not denied by the defendant James W. Offield. But his contention is that he did not state as a positive fact that there were seventy acres, but that he believed there were; that he was solicited by the plaintiffs to guarantee to them that there were seventy acres, and refused to do so, but told them that there were seventy acres or about seventy acres. This statement in relation to the guaranty is emphatically denied by the plaintiffs, and by other witnesses who were present at the time of the conversation spoken of, and the jury evidently believed and were justified, we think, in believing, that there was no such con-

versation had at that time, and that there was in effect a positive representation, upon which the parties plaintiff acted, that there were seventy acres cultivated to orchard.

In regard to the right of plaintiffs to act upon this representation there is quite a diversity of authority, and it is difficult to lay down a general rule because there are particular circumstances controlling almost every individual case. *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260, a case which is cited and relied upon strongly by the appellants, and which in some of its circumstances it must be said is similar to the case at bar, was where O'Connor represented to Van Horn that there were two hundred and forty acres of land in cultivation in the half section which Van Horn was purchasing, that there were some thirty acres more which could be cultivated, and that there would be not over fifty or sixty acres of waste land. These statements proved to be not exactly correct, and it was shown that there was not as much land under cultivation as had been represented. The trial court found that Van Horn had no cause of action, and that judgment was affirmed by this court, the court saying:

"It is clear from appellant F. M. Van Horn's evidence that he obtained all the land which was shown him, and some which was stated did not go with the half section purchased. But the important and controlling question in the case is whether, after examining the land, appellant may complain because there is not as much tillable land as was represented by the respondents. This court has frequently held that, where representations are made as a matter of opinion, there is no liability for misrepresentations, where the parties are dealing at arm's length and the means of knowledge are as open to one party as to the other. . . . But, where the representations made are of material facts within the knowledge of the vendor, and entirely without the knowledge of the vendee, and where the circumstances are such as reasonably call for a reliance thereon, the rule is that the vendee may rely upon the representations of the vendor."

The court was of the opinion in that case that there was no confidential relation existing between Mr. O'Connor and

Mr. Van Horn, that the representations made were expressions of opinion about facts which were as open and obvious to the appellants as to the respondents, and that appellants had an opportunity to obtain the facts about which representations were made, and for that reason dismissed the action.

Conceding here the correctness of the principles of law laid down in that case, we think this case falls within the second principle announced, viz., that the representations made were material facts within the knowledge of the vendor and entirely without the knowledge of the vendee, and where the circumstances reasonably called for a reliance upon such representations. It makes no difference whether the representations made were known by the vendor, as found by the court in this instance, to be false, or not. The effect on the purchaser would be the same, and if he had a right, under all the circumstances, to rely upon them, and did rely and act upon them, he can recover. There is a difference between the right of a vendee to rely upon the representations of the vendor where the means of determining the truth of the representations are at hand and it is easily determined, as in the case just cited, and a case of this kind where, as shown by the testimony, these plaintiffs were entirely unfamiliar with the fruit business, having come from a locality where orchards were not grown. They stated to the defendant at the time of the transaction that they knew nothing about the business, and when they were down examining the orchard, told him that they did not know a peach tree from a cherry tree, and in many instances he pointed out to them the difference in the trees.

This case falls more squarely within the rule of law announced in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054. There the action was instituted to recover damages for false representations made by the defendants in the negotiations leading up to the contract of sale, both as to the quantity of land to be conveyed and the number of acres

susceptible of irrigation from the water company's canal by gravity flow. The defendants represented that the tract to be conveyed by the water company contained sixty acres in all, and that the sixty acres were so situated in reference to the water company's canal that the entire tract could be irrigated therefrom by gravity flow. It eventuated that in fact the tract contained only 52.64 acres, and 28.24 acres of this were above the level of the canal and could not be irrigated therefrom. It also appeared that the purchaser visited the land, accompanied by certain of the grantors, and viewed the premises in a general way. But it appeared that the portion of the land which could not be irrigated from the canal could only be ascertained by an accurate survey, as we think it appears in this case that the area of this orchard could only be obtained by an accurate survey. The court in the trial of that case, upon the close of the plaintiff's testimony, granted a nonsuit to the defendant. In reversing the judgment of the court, it was said:

"Nor can we agree with the court below that the doctrine of *caveat emptor* applies to the representations made by the respondents to the effect that the entire tract was under the level of the canal and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*";

citing *Strand v. Griffith*, 97 Fed. 854, and *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069, where it was said:

"The unmistakable drift is towards the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim";

also citing 14 Am. & Eng. Ency. Law (2d ed.), p. 120, where the rule is stated as follows:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own

knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself."

The opinion concludes:

"All the cases agree that the purchaser may rely upon representations of the vendor where the property is at a distance, or where for any other reason the falsity of the representations are not readily ascertainable; . . ."

It appears that the orchard in this case was in an irregular or zigzag shape, and that it was a very difficult matter to determine its area. It is claimed that it was easily within the power of the plaintiffs to ascertain whether there were seventy acres in the orchard; but such ascertainment could have been made only by scientific survey. It plainly appears from the testimony that, either the representations made by the defendants were false and were known by them to be false when made, or else it was a matter difficult of ascertainment, for the defendants had owned and operated this farm for thirty years, setting out in different years different portions of this orchard, and if they in this long period of operation were not aware of this discrepancy, it is unreasonable to hold these plaintiffs, who were entirely new to the business, to a speedy determination of the area. It was not a slight discrepancy in representation. The planting and rearing of an orchard to a bearing age is a costly business, and the difference between seventy acres of land planted to fruit trees and 48.40 acres is almost a third difference in area. When it is admitted that the purchase price of this land was $35,000, and that practically all the value of the land was in the orchard, it is seen that the plaintiffs were deprived of nearly one-third of the value of their purchase as they understood it; so that the only debatable question in this case is, whether they acted with due diligence in ascertaining the falsity of the representations. An orchard of forty-odd acres

of growing fruit, especially when it is in the irregular shape that this orchard was shown to be, is liable to mislead an inexperienced person concerning its area, and under all the circumstances of this case we think that there was no such laches on the part of the plaintiffs as would prevent them from bringing this action for rescission upon the grounds alleged.

The judgment will therefore be affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8894. Department Two. August 5, 1910.]

H. G. RICHARDSON, *Plaintiff and Appellant*, v. NELLIE HARKNESS *et al.*, *Defendants and Appellants*.[1]

APPEAL—DISMISSAL—BRIEFS. A motion to dismiss an appeal submitted on briefs which makes no showing of the facts or record relied on to support the same will not be considered on appeal.

EXECUTORS AND ADMINISTRATORS—CONTRACTS OF DECEDENT—SPECIFIC PERFORMANCE. An option to purchase land contained in a lease, the lessee being the owner of premises thereon may be specifically enforced, in probate, after death of the lessor, under Rem. & Bal. Code, § 1610, providing for the specific performance of contracts by decedents.

VENDOR AND PURCHASER—OPTIONS—CONSIDERATION. An option in favor of a lessee to purchase the land at any time during the life of the lease is supported by a sufficient consideration.

SPECIFIC PERFORMANCE—OPTIONS—PRICE—ARBITRATION—DETERMINATION OF VALUE. Specific performance may be decreed of an option to purchase land at a reasonable price, although it provides for an appraisement by two arbitrators, and if they cannot agree, by a third selected by them; and where the arbitrators are unable to agree upon the value or to select a third arbitrator, the value may be fixed by the court.

Cross-appeals from a judgment of the superior court for Thurston county, Rice, J., entered November 29, 1909, decreeing the specific performance of a contract to convey real

[1]Reported in 110 Pac. 9.

property and determining the value thereof, after a hearing on the merits before the court. Affirmed.

S. P. Richardson and *Troy & Sturdevant*, for plaintiff.

J. W. Robinson and *R. H. Fry*, for defendants.

Thomas M. Vance and *Harry L. Parr*, for respondent administrator Crosby.

DUNBAR, J.—On August 20, 1907, Edward Harkness and wife gave H. G. Richardson a lease of block 52 of Olympia, the same being community property, the lease to run from January 1, 1908, to January 1, 1910. Richardson was to pay $25 per month rental. Among other things, the lease has the following provision:

"It is further agreed and understood between the parties hereto that the said party of the second part is the owner of the buildings on said premises and at the end of this lease the said party of the second part shall have the right to remove said buildings if he shall so elect. It is further agreed by and between the parties hereto that the party of the second part, his heirs or assigns, has the right to purchase the property herein leased at any time during the period of this lease, viz: from January 1, 1908, to January 1, 1910, the price to be ascertained therefor as follows, to wit: the party of the second part, his heirs or assigns, shall offer a price deemed reasonable by him and if said price shall not be accepted by the parties of the first part or their executors or administrators then the parties of the first and second part herein shall each appoint an arbitrator, both to be residents of Olympia, Washington, who shall appraise said lands exclusive of the improvements thereon, and the sum agreed upon shall be the purchase price of said above described real estate. If said arbitrators fail to agree they shall appoint a third arbitrator. Said three arbitrators shall then appraise said lands, excluding improvements, and determine the then value thereof, and the sum any two of said arbitrators shall agree upon shall be the purchase price to be paid by said party of the second part, his heirs or assigns, to said parties of the first part, their executors or administrators."

On December 24, 1907, Edward Harkness died in Cali-

fornia, leaving a will by which he devised to Nellie Harkness a life estate in his half of block 52, and the title to two sons, Warren E. and Harold J. Harkness, minors, who appear here by a guardian *ad litem*. This will was probated at the home of the deceased, and the widow, Nellie Harkness, was appointed administratrix January 21, 1908. As appears from the records, all the debts have been paid and the property distributed, and Nellie Harkness discharged as administratrix by the California court. On October 8, 1908, Walter Crosby was appointed administrator of this estate with the will annexed, by the superior court of Thurston county. On October 17, 1908, Richardson filed his petition, demanding a specific performance of the option to purchase contained in the lease as above quoted. On November 14, 1908, the petition came on for hearing before Judge Yakey, who took the proofs as to the execution of the lease and as to the notice given to the parties interested, found that due notice had been given and served upon the administrator, heard evidence generally on the circumstances surrounding the case, found that Richardson had made a tender under the provisions of the contract to Walter Crosby, administrator of the estate of Harkness, deceased, of the sum of $2,000, being the price determined upon under the contract as a reasonable and fair price for the said real estate, and found that he had kept his tender good. It was therefore ordered and decreed that the time within which the arbitrators should act should be deemed as running from the date of said order, viz., the 14th day of November, 1908, and they were ordered to proceed under the provisions of said contract and carry out said provisions. The administrator was directed to proceed and carry out the provisions of the contract by conveying said real estate for the consideration to be determined by the arbitrators and in accordance with said contract. The two arbitrators appointed were unable to agree upon the valuation of the property. They were also unable to agree upon a third arbitrator. After the arbitrators had failed to act,

Richardson filed his petition, praying that the court compel the administrator to execute a deed for said block 52 in consideration of $2,000. A guardian *ad litem* was appointed for the minor children, demurrers, raising the sufficiency of the facts stated in the petition, were filed and overruled, separate answers were filed to Richardson's petition for specific performance, setting up various defenses, and upon trial of the case, the judge fixed the price of the block at $5,000. Both litigants appealed, Harkness *et al.*, generally, and Richardson from the order fixing the price; and the case is now here for determination.

The plaintiff moves to dismiss the appeal of Harkness *et al.*, for the reasons alleged, (1) because said appeal was not taken or perfected in the manner required by statute; (2) because no bond was given as required by statute or at all, because the bond given does not comply with the requirements of the statute with reference to bonds on appeal, and that said bond is totally deficient, and (3) because it appears upon the face of the record that this court has no jurisdiction of said appeal. As there is no intimation in the brief—the case having been submitted upon briefs—or showing of facts or statement of record cited on which this motion is based, we are not inclined to enter into its discussion.

The principal contention of the defendants is that the contract set forth in the petition was not such a contract as would warrant a specific performance. Outside of the fact that all questions concerning the construction of the statute in this regard must have been decided by Judge Yakey in his order made on the 14th day of November, 1908, and unappealed from, it is evident that the petition in this case sets forth facts sufficient to warrant the enforcement of specific performance, if such facts are true. Section 1610, Rem. & Bal. Code, provides that:

"If any person, who is bound by contract, in writing, to convey any real property, shall die before making the conveyance, the superior court of the county in which such real

estate or any portion thereof is situate may make a decree authorizing and directing his executor or administrator to convey such real property to the person entitled thereto."

The succeeding section provides the manner in which the rights of the parties shall be determined, and in which they shall be enforced. This contract especially provides for the conveyance of this land at the option of Richardson, and if there is any merit in the contention that the contract is not enforceable in specific performance, it must be upon the theory alleged by defendants that there was no consideration for that portion of the contract providing for the conveyance of the real estate. But there was or might have been a consideration. It might reasonably have been that the consideration was expressed in the contract of lease, and that the lessor would not have entered into the contract or have paid the amount of money which he agreed to pay, and did pay under the lease, had he not been granted the option provided for in the contract. Richardson entered into possession under this contract, because it does not militate against this theory that he happened to be in possession under an old contract at the time this contract was made. He remained in possession under the contract, expended money in improvements under the contract, and equity would enforce his right to the specific performance provided for in the contract.

It is also urged that, inasmuch as the contract provided for the determination of the value of the land by arbitrators, he had no right to file his application asking the court to determine by its decree the value of the land, but that it should be determined in the way, and only in the way, provided by the contract. But it is shown conclusively that the arbitrators provided for in the contract were not able either to arbitrate as to the value of the land, or to agree upon the third arbitrator. So that Richardson was helpless in that respect, and of course, under such circumstances, the courts were open to him for the purpose of determining his rights under the contract. We think there was no error made by the court in

overruling the demurrers, or any of the objections interposed.

The question was then determined upon its merits as to the value of the land, the court finding that the value of block 52 was $5,000, and as we have before said, both parties have appealed from this finding. Many witnesses were introduced upon each side who testified upon the question of the valuation of this land, and their testimony varied widely. We shall not attempt to enter into an analysis of the testimony of the different witnesses. But from an examination of such testimony, and also from the fact that the premises were viewed by the court who tried the case and rendered the judgment, we are not inclined to disturb the finding as to value.

The judgment in all things will be affirmed, each party to pay the costs of his appeal.

RUDKIN, C. J., PARKER, CROW, and MOUNT, JJ., concur.

[No. 8763. Department Two. August 5, 1910.]

C. A. BECK *et al.*, *Respondents*, v. CHARLES BONO *et al.*, *Appellants*.[1]

WATERS AND WATER COURSES—DIVERSION—INJUNCTION—PARTIES. In an action to enjoin the diversion of waters of a creek by a riparian owner and for damages, there is no defect of parties defendant because the plaintiff failed to join upper appropriators of the waters.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered September 3, 1909, in favor of the plaintiffs, in an action for an injunction and for damages, after a trial on the merits before the court without a jury. Affirmed.

Brooks & Bartlett, for appellants.

Sharpstein & Sharpstein and *Edward C. Mills*, for respondents.

[1]Reported in 110 Pac. 13.

PER CURIAM.—This was an action brought by the respondents, seeking to enjoin appellants from interfering with certain water rights claimed by the respondents, for the establishment of such rights, and for damages for the illegal use of the waters of certain streams in Walla Walla county. The riparian rights of the parties to the action were determined by the court, and judgment was decreed in favor of the plaintiffs (respondents) against the defendants (appellants) for damages in the sum of $400 and costs.

The appellant in commencing his argument says, this cause is characterized in its inception by the unwarranted deprivation, through the interposition of the court, of the rights of the defendants to the use of any of the water of the Yellowhawk creek on the Bono ten-acre tract, and of the use of the water from the Robinson ditch on any of their lands; and in its conclusion by an attempt to extort damages in an amount the existence of which is sought to be established rather by the enormity of the demand than by persuasion of the evidence. It was finally conceded by the plaintiffs, and granted by the court, that the defendants had a right to divert water from the Yellowhawk creek along the route of the iron pipe line across the plaintiffs' lands, and to a two-fifths interest in the Robinson ditch. As a result much of the vital part of the action has been eliminated, leaving subsidiary and minor questions for determination and settlement. So that the questions brought here on appeal are simply moot questions, or at least affect only the merits of the case in so far as they bear upon the question of damages.

Contentions were made under the complaint concerning the lack of defendants' riparian rights, which were abandoned at the trial, and from the examination of the voluminous testimony in the case we think the award was, to say the least, as favorable to the appellants as they deserved. The only contention that can affect appellants' rights, so far as the judgment for damages is concerned, is that there is a defect of parties, because it is alleged by the appellant that there were

appropriators of the waters of this creek above the land of the parties to this action. It is not necessary to make others parties to this action to determine whether the defendants should be enjoined from wrongfully diverting waters to the damage of plaintiffs; that is a question of proof. Under the allegations of the complaint they were entitled to the injunction, and we think the proof sustained the allegations.

From a careful examination of all the testimony in the case we are not inclined to disturb the findings of the court in reference to the amount of damages adjudged. The judgment is affirmed.

[No. 8825. Department Two. August 5, 1910.]

J. L. PRICKETT, *Appellant*, v. ORLANDO L. SLOGGY *et al.*, *Respondents*.[1]

PARTNERSHIP—EVIDENCE OF RELATION—SUFFICIENCY. The evidence shows that a partnership relation existed in a saloon business, although the oral evidence is conflicting, where the more convincing part of the testimony is composed of matters of record and bookkeeping, and it appears that plaintiff, who claimed to be a silent partner, advanced $2,229 to buy the business, there was never any understanding as to the rate of interest, and he was paid from time to time dividends out of the net profit, to the amount of $2,100 in two years, each of three parties taking a one-third part; the amounts repaid being inconsistent with the theory of interest on a loan.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered December 22, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for the dissolution of a partnership, and for an accounting. Reversed.

R. L. Edmiston, for appellant.

Wakefield & Witherspoon, for respondents.

[1]Reported in 110 Pac. 11.

PER CURIAM.—According to the statements of the complaint in this action, about June 1, 1903, J. L. Prickett, the plaintiff herein, and Edward L. Pike, one of the defendants, made and entered into an oral agreement of partnership, for the purpose of acquiring, building up, and conducting, as equal partners, a saloon business in the city of Spokane, under the terms of which partnership agreement Prickett was to furnish said partnership the necessary money to buy appropriate fixtures, stock, etc., and they were to share alike the profits of the business. Afterwards, upon the suggestion of Pike, one Sloggy was admitted to the partnership, and it was agreed that Sloggy and Pike were to have $125 a month for their services. Prickett did not wish to be known in the transaction, but was a silent partner. This statement is vigorously denied by the defendants, they claiming that they simply borrowed the money of Prickett to enter into this saloon business, that he had no interest in it whatever, and was attempting to impose himself upon them wrongfully as a partner. The complaint is long, but what we have stated is sufficient to make clear the character of the case. The complaint prayed for a dissolution and an accounting. The court below confined the trial to the single issue of the partnership, and at the conclusion of the trial of this issue rendered judgment for defendants, holding the evidence insufficient to prove a partnership. A bill of sale figured in the transaction, which the court ordered turned over to Sloggy and Pike. The plaintiff's case was dismissed with costs.

This court always regretfully reverses the judgment of the trial court on questions of fact, because it stands confessed that the trial court, hearing the witnesses and noticing their demeanor on the stand, and being in the atmosphere of the trial, is better calculated to judge of the facts than the appellate court. But notwithstanding this, after an examination of this record, we are constrained to hold that the court erred in its findings of fact. Much of the testimony,

and the more convincing part of it, is composed of matters of record and of bookkeeping, which the appellate court can as well judge of as could the trial court. It would serve no good purpose to enter into a lengthy analysis of the oral testimony, for it is conflicting to the highest degree, the testimony of plaintiff being to the effect that there was a tacit understanding that he was to be a silent partner in the concern, and the testimony of the defendants being exactly the opposite.

It is conceded by all the parties that, in June, 1903, when this business was initiated, the plaintiff advanced, for the purpose of buying the business, $2,229.25. It is further conceded that, by December, 1907, this money had been paid back to Prickett. It is further conceded that there was never any understanding in relation to the interest that should be paid to the plaintiff for the use of this money, and that during the next two years he had received from the profits of the saloon something like $2,100. The first dividend after the payment of the initial money was $450, which was from the net receipts of the business; and the same was paid by checks of $150 each issued to Prickett, Sloggy, and Pike. In February another dividend of $750 was declared, each of the parties above mentioned receiving a check for $250, which checks were recorded as dividends. In April, 1906, a further dividend of $900 was paid from the net profits, a check for $300 being issued to each of the three men interested. In May a further dividend of $600 was issued in like manner. In October a further dividend of $600 was paid from the net profits by checks, each man, viz., Prickett, Sloggy, and Pike, receiving one-third of the amount by checks marked "Dividends." In November, 1906, a further dividend of $450 was paid in the same manner, $150 being issued in like character of checks to each of the said parties. In April, 1907, a further dividend of $600 was paid, by the issuing of checks for $200 to each of said parties. In May, 1907, a further dividend of $450 was paid

from the net profits of such business by checks, $150 being issued to each party. Further on during the summer a further dividend of $—— was paid in the same manner, and in October, 1907, a further dividend of $900 was paid by check, in the same manner, and marked in the same way. It appears that no further dividends or payments of profits from such business have been made to the plaintiff.

It is true that the contract in this case was very indefinite and very unbusinesslike, and had there been no subsequent transactions tending to establish a partnership, it would be doubtful if the testimony was sufficient to establish it. But the action of the parties after the initial money was paid, in paying these considerable amounts of money in equal shares to each of the three parties interested, for so long a time, is inconsistent with the theory that the money was borrowed, and that interest alone was to be paid for it. The very fact that $2,100 was paid for the use of $2,229 for a period of two years, is an indication that it never was intended that this money was paid for interest. In fact, it was not interest on $2,229 for two years, because the payments of this $2,229 commenced shortly after the purchase of the business. Mr. Porter, a witness who examined the books of the concern when there was an attempt at an adjustment of the misunderstanding, testified as follows:

"My recollection now is that there was several times that it was necessary for me to ask Mr. Pike, who was the one person at the time that did this work, as to the significance or meaning of certain checks that I was handling, and at one of such times I inquired what this was—this dividend—the meaning of this word 'dividend,' in conjunction with the checks and the bookkeeping. Q. State what he told you the meaning of it was. A. That it was a division of the profits of the business between Mr. Sloggy and Mr. Prickett and himself, as the check evidenced. I might add that the checks ran in groups of three of equal amounts at that time."

This was a disinterested witness, and this bookkeeping had principally been done by Mr. Pike.

From the whole record in the case we are convinced that

there was a partnership interest of one-third resting in Prickett, and therefore the judgment will have to be reversed, and the case remanded with instructions to try the case on the theory that a partnership existed, and make such disposition of it as the law and the facts will warrant.

[No. 8495. Department Two. August 5, 1910.]

In re BLEWETT STREET, SEATTLE.

REBECCA WOLVERTON, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS — EMINENT DOMAIN COMMISSIONERS. The board of eminent domain commissioners created by Rem. & Bal. Code, § 7788, are city officials, and not within Const., art. 11, § 5, requiring all county, township, precinct, or district officers to be elected.

SAME—EMINENT DOMAIN—ASSESSMENT OF LANDS NOT TAKEN—VERDICT. Where a jury in condemnation proceedings for land taken for an improvement found generally that lands not taken were not damaged, the same may be assessed for benefits; and it cannot be shown that the jury merely found that the lands were not damaged in excess of benefits, by oral evidence to the effect that at the trial before the jury it was stipulated that the only issue was whether the lands were damaged in excess of the benefits and that witnesses for the city admitted damage and the jury were instructed that the damage must exceed the benefits; since such evidence and the general verdict, in the absence of special finding, does not necessarily imply that the jury found any actual damage.

Appeal from an order of the superior court for King county, Frater, J., entered July 22, 1909, confirming an assessment roll, after a hearing before the court on the merits. Affirmed.

Carkeek & McDonald, for appellant.

Scott Calhoun and *Howard A. Hanson*, for respondent.

[1]Reported in 110 Pac. 29.

Crow, J.—Ordinance No. 14,889 of the city of Seattle provided for the condemnation of private property to extend Blewett street, and for the levy of a special assessment to pay the compensation and damages awarded. On October 2, 1907, the city filed its petition in the superior court, praying that just compensation be made for property to be taken and damaged. Edith May Graham appeared as owner of land a portion of which was to be taken. The jury by their verdict awarded her $3,257.50 for the land taken, and found that the remainder of her land was not damaged. Judgment was entered upon the verdict, and on July 28, 1908, the city filed its supplemental petition for a special assessment to pay compensation to the various owners for their property taken and damaged. The matter was referred, by order of court, to the board of eminent domain commissioners of the city of Seattle, to make an assessment in the manner provided by law. An assessment was prepared, which, upon the hearing of exceptions thereto, was set aside, and the matter was again referred to the commissioners for a new assessment, which was prepared and in due course of procedure filed with the clerk. Pending these proceedings, Edith May Graham conveyed her interest in the tract not taken to Rebecca Wolverton, who on June 28, 1909, filed objections to an assessment of $300 thereon, which had been made by the commissioners. These objections were heard on July 7, 1909, and overruled by the superior court, which confirmed the reassessment. From the order of confirmation, Rebecca Wolverton has appealed.

Appellant first contends that the assessment roll was prepared by a board not authorized by law; that it is therefore void; and that the act, Rem. & Bal. Code, § 7788, creating the board of eminent domain commissioners and providing for their appointment, is in violation of § 5, art. 11, of the state constitution, which requires their election. The section mentioned reads as follows:

"The legislature, by general and uniform laws, shall pro-

vide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township, or precinct and district officers, as public convenience may require, and shall prescribe their duties and fix their term of office. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population. And it shall provide for the strict accountability of such officers for all fees which may be collected by them, and for all public moneys which may be paid to them, or officially come into their possession."

It is manifest that this section has no application. The board of eminent domain commissioners are city officials. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279. They are not officials of any county, township, precinct, or district, all of which political organizations may be clearly distinguished from municipal corporations, such as cities or towns, created by law, and authorized to conduct a local self-government having a mayor, common council, and other officials. It was not the intention of the framers of the constitution, nor of the people who adopted it, to require the election of each and every officer of a municipal corporation. Courts will not declare an act of the legislature invalid when it is claimed to be in conflict with the constitution, unless such conflict be clear and unquestioned. Every intendment must be given force in favor of the constitutionality of the law. We find no conflict here.

On the hearing of appellant's objections to the reassessment, she called one of the eminent domain commissioners, who testified that the board did not make any inquiry as to evidence presented on the condemnation trial, but that they assessed according to special benefits all property as to which the jury had returned a verdict of no damages, and that in his opinion the assessment of $300 on appellant's property was not more than it would be specially benefited, nor more than its proportionate share of the cost of the improvement. Appellant then called the court stenographer who had reported the condemnation trial, and asked:

"I'll ask you to state whether or not the parties, Edith May Graham and the petitioner, the city of Seattle, did not at that trial agree on all the issues between them, except the question of damages to the remainder of the original tract, that is, the tract now in controversy, and that was the only question contested and submitted to the jury."

An objection being sustained to this question, appellant, through her attorney, then made the following offer:

"I now offer to prove by this witness that on June 4th, 1908, a trial was had before a jury in this cause on the original petition filed herein for the condemnation of the parcel of land of which the property assessed in this roll is the remainder not taken in said proceeding. That by a stipulation entered into in open court on said trial, between Edith May Graham, then owner of said property, the grantor of objector Rebecca Wolverton, and the petitioner, the city of Seattle, the only issue contested and submitted to the jury was the question of whether or not the remainder of said lots was damaged in excess of the benefits by the improvement proposed herein, and if not, the extent of such damage. That the said Edith May Graham introduced evidence to the jury that the property herein assessed, being the part of the original not taken, was damaged in the sum of $500 by reason of the taking of the part condemned, over and above any local or special benefit arising from such proposed improvement. That the witnesses for the city and all the evidence introduced by said petitioner admitted that the remainder of said original tract would be damaged were it not for the fact that the special benefits accruing from the improvement to the part of the land not taken would equal and just offset the damages sustained by it, and that therefore, said remainder of said original lot would not be damaged. And I further offer to prove by this witness that his honor Judge Arthur E. Griffin, the judge presiding at said trial, instructed the jury that the damages found in respect to the remainder of said proposed lot should be over and above any special benefit arising from said improvement."

To this offer an objection was also sustained and an exception allowed. Appellant insists that the trial court erred in rejecting this offer, and contends that in a condemnation proceeding, when a municipal corporation attempts to assess

benefits upon the residue of a lot, a part of which has been taken for a street, it is proper to show by parol evidence that at the condemnation trial the benefits accruing to the residue were offset against the damages done thereto, and that if in fact the jury offset the benefits against the damages, and found that the one was just equal to the other, the city has already received full compensation for the benefits conferred, and should be estopped from making any special assessment. This court in *Smith v. Seattle*, 41 Wash. 60, 82 Pac. 1098, and *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, in substance held, that when an actual award of damages to property not taken has been made in a condemnation suit, and the jury in arriving at such award had under instructions offset all legal and special benefits arising from the proposed improvement, an assessment against the damaged property for the same improvement cannot be sustained. Those cases have no application here, the jury having awarded no damages.

After calling attention to the fact that our eminent domain act was taken from that of Illinois, appellant cites *Leopold v. Chicago*, 150 Ill. 568, 37 N. E. 892, and insists that it should be followed by us. In that case the Illinois court did hold that evidence such as appellant offered to introduce was competent and admissible. But in the later case of *Chicago v. Mecartney*, 216 Ill. 377, 75 N. E. 117, the same court, in commenting on the *Leopold* case, said:

"As to the case just cited, it may be said that the legal principles stated in the opinion are correct and in accordance with previous decisions, although the conclusion drawn from them is perhaps a *non sequitur* which should not be followed."

The conclusion was that the evidence should have been admitted. If the trial judge had admitted the evidence offered in this action, it could not be determined therefrom that the jury in the condemnation proceeding actually found that the damages to the land not taken amounted to just

$500; that the benefits from the improvement were exactly $500, and that by offsetting the one against the other they reached their verdict of no damages. In other words, the evidence would not exclude the theory or probability that in weighing the evidence the jury may have rejected as unworthy of belief all evidence introduced to show damages, and may not have found any damages whatever against which they would be called upon to offset benefits. With the evidence admitted as offered, it would have been impossible for the trial judge to positively reach the conclusion that the jury did find damages, or that it did offset benefits. Appellant's only purpose in offering the evidence was to create an estoppel and prevent the city from making any assessment whatever, but there could be no such estoppel unless the jury did actually find damages and did actually offset against such damages all benefits to the property not taken. The final verdict may have been reached by rejecting all evidence of damages and without offsetting benefits, or the benefits might have exceeded the damages by a very considerable sum. In *Soderberg v. Armstrong*, 116 Fed. 709, the plaintiff sought to enjoin the defendants from extracting ore from a mining claim. The defendants pleaded in bar a former suit for substantially the same purpose, between them and plaintiff's assignor, in which they, the defendants, denied ownership of the mine by plaintiff's assignor, also denied that they had extracted any ore, and alleged that on a jury trial and the evidence then introduced, a verdict was returned and a judgment was entered in their favor. In holding that the judgment thus pleaded did not constitute an estoppel, the court said:

"It clearly appears from the pleadings therein that defendants might have obtained a verdict in their favor upon two different and independent grounds,—one that complainant was neither the owner of nor entitled to the possession of the mining ground in controversy; the other, if the defendants failed to sustain this proposition, that they had never extracted any ore from any part of the ground. The extrinsic

evidence adduced by the defendants shows that both of these questions were properly submitted to the jury; but this fact does not show that both questions were decided by the jury. The judgment was rendered upon the verdict of the jury. Who can tell from the record upon which point the jury decided the case? In *McDowell v. Langdon*, 3 Gray, 513,—a case in principle on all fours with this case,—it was held that a verdict and judgment for the defendant in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty, and a specification of defense denying both the plaintiff's right and an injury thereof, are no bar to a suit in equity to restrain such obstruction, unless it appear, either by the record or by extrinsic evidence, that the defendant did not prevail in that action for want of proof that he had violated the plaintiff's right."

So here, with the offered evidence and proof admitted, it would be impossible, in the absence of special findings, to determine from such evidence and from the general verdict of no damages in the condemnation proceeding that the jury actually found the land taken had been damaged, and in addition thereto that, having so found, they offset all benefits against such damages. Appellant erroneously assumes the respondent's position to be that, because the jury found no damages, they must necessarily have found benefits. On the contrary, its only position is that the verdict found no damages, and that no finding either of benefits or no benefits was necessarily made. In the absence of special findings, it cannot be now determined whether the jury actually offset benefits against damages. Benefits have since been found by the board of eminent domain commissioners, as the basis of an assessment. The appellant, upon the hearing of her objections, was entitled to show, if such was the fact, that no benefits had resulted to her property from the improvement, but she could not make that showing in the manner attempted, or by proceeding upon the theory that the general verdict of the jury, aided by the repetition of the evidence admitted on the condemnation trial, would establish her contentions. In *Chicago*

v. Mecartney, supra, the supreme court of Illinois further said:

"If the jury in a condemnation proceeding award damages for property not taken the judgment is conclusive against a subsequent proceeding to assess it for benefits, because the judgment is conclusive that there are damages and not benefits; but where a jury simply find that there are no damages, the verdict and judgment are not and cannot be conclusive that there are no benefits. The fact that property is greatly benefited and doubled in value by an improvement is not inconsistent with a verdict that it is not damaged, but perfectly consistent with it. It would seem to be an absurdity to say that the finding of a jury that the property of defendant in error was not damaged was also a finding that it was not benefited—a question which the jury could not legally consider."

We find no error in the record. The judgment is affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8967. *En Banc.* August 5, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Benjamin R. Fish, Plaintiff*, v. I. M. HOWELL, *Secretary of State, Respondent.*[1]

STATES—STATE OFFICERS—VACANCY—EXPIRATION OF TERM. Under Const., art. 3, § 13, providing that a vacancy in a state office not otherwise provided for shall be filled by the governor by appointment "which shall expire when a successor shall have been elected and qualified," the constitution not providing in direct terms for elections to fill vacancies except in the offices of supreme and superior court judges, an appointment to fill a vacancy in the office of secretary of state is for the balance of the term for which his predecessor was elected, or until the next general election for state officers, fixed by the constitution at every fourth year.

ELECTIONS—TIME FOR HOLDING—VACANCY. Elections do not follow by reason of a vacancy, as there can be no election except under express statutory authority.

[1]Reported in 110 Pac. 386.

Application filed in the supreme court July 19, 1910, for a writ of mandate to compel the secretary of state to file the relator's declaration of candidacy for the office of secretary of state. Denied.

G. C. Israel and *Frank C. Owings*, for relator.

The Attorney General and *W. V. Tanner, Assistant*, for respondent.

CHADWICK, J.—On the 4th day of May, 1909, Sam H. Nichols, who had been regularly elected to the office of secretary of state at the general election held on the 7th day of November, 1908, tendered his resignation, and thereafter, on the 10th day of May, 1909, the respondent, I. M. Howell, was appointed by the governor to the office of secretary of state. On May 15, 1909, he regularly and duly qualified and has ever since been, and is now, discharging the duties of that office. On the 19th day of July, 1910, the relator, Benjamin R. Fish, tendered a declaration of his candidacy for the office of secretary of state, under the provisions of the direct primary law, contending and claiming that the vacancy so occurring in the office of secretary of state and filled by appointment as aforesaid, was limited to the next general election, at which time the office should be filled by a vote of the people. His tender being refused, this proceeding was brought so that the question might be settled by the judgment of this court.

It will be evident that the only question for our determination is whether, under the constitution and laws of this state, an election for the office of secretary of state is to be held at the oncoming general election. Section 1, art. 3 of the constitution, relates to the date and place of voting, and in no way fixes the term of the officers mentioned therein. It is as follows:

"The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a

commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature."

Section 3, art. 3, of the constitution, provides:

"The lieutenant governor, secretary of state, . . . shall hold their offices for four years respectively, and until their successors are elected and qualified."

Section 13 of the same article provides:

"When, during a recess of the legislature, a vacancy shall happen in any office the appointment to which is vested in the legislature, or when at any time a vacancy shall have occurred in any other state office for the filling of which vacancy no provision is made elsewhere in this constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

The respondent was appointed and holds his office under the terms and provisions of this section. The only other section of our constitution pertinent to the question under consideration is § 8 of art. 6:

"The first election of county and district officers not otherwise provided for in this constitution, shall be on the Tuesday next after the first Monday in November, eighteen hundred and ninety, and thereafter all elections for such officers shall be held biennially on the Tuesday next succeeding the first Monday in November. The first election of all state officers not otherwise provided for in this constitution, after the election held for the adoption of this constitution, shall be on the Tuesday next after the first Monday in November, eighteen hundred and ninety-two, and the elections for such state officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November."

The constitution does not in direct terms provide for elections to fill vacancies in state offices, except as such vacancies may occur in the offices of supreme or superior court judges. Sections 3 and 5, of art. 4, make such provision in the following language:

"If a vacancy occur in the office of a judge . . .the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term."

Following the ordinary rule of statutory construction, it would seem that, if the members of the constitutional convention intended that all offices as well as those of judges should be filled at the next general election, they would have so provided either by particular reference as in the case of judges, or by a general provision. Not having done so, the case reduces itself to a construction of the words "which shall expire when a successor shall have been elected and qualified."

The constitutional or statutory provisions for the time of an election to fill vacancies in public offices vary in the different states. "Until the next general election;" "the next election by the people;" "the next annual election;" "until the next general election or until their successors are duly elected and qualified," etc. etc., are the usual terms employed. In only one state—Oregon—is there a provision in the exact language adopted by the framers of our constitution. These several provisions have been construed in different ways by the courts, some of them holding that the office being elective, it is the policy of the law to sanction the filling of a vacancy by appointment only *ad interim* until the next general election, when the people may assert the right of franchise and selection; others holding that the term and not the person is the paramount consideration, and that the appointment continues until the next general election at which, in the regular order of things, the election for such office is provided by law. Much might be said on either side, for the policy of the law is debatable. But, however much conjecture has been indulged in the cases, all of them in their last analysis depend upon a proper construction of the constitution and statutory provisions, and not upon the consideration

of those theoretical questions proper to be considered, and which we must presume have been considered, by the legislative body or the people as a whole when the constitution was adopted. It will be borne in mind that our constitution does not use the words "next general election," but does say that the appointment "shall expire when a successor shall have been elected and qualified." Adopting relator's theory that the proper construction of our constitutional provision is that it means the next general election, we find that the words "next general election," and equivalent phrases, have been construed by the courts, and the modern authority is that the appointment does not expire until the expiration of the regular term, unless such be the plain intent or unmistakable terms of the statute.

In *State ex rel. Watson v. Cobb*, 2 Kan. 32, and in *Matthews v. Com'rs of Shawnee County*, 34 Kan. 606, 9 Pac. 765, approved in *Ward v. Clark*, 35 Kan. 315, 10 Pac. 827, it was held that the phrase "next general election," as found in the constitution of Kansas, meant "the next election held conformably to established rule or law;" also, "the regular election prescribed by law for the election of a particular officer to be elected." In *People ex rel. Lynch v. Budd*, 114 Cal. 168, 45 Pac. 1060, 34 L. R. A. 46, under a contention that a vacancy in the office of lieutenant governor should be filled at the first general election following the occurrence thereof, the court said, after quoting § 8, art. 5, of the constitution of that state, which reads:

"When any office shall from any cause become vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature, or at the next election by the people,"

"An office has become vacant, and there is no other mode provided by the constitution or laws to fill it. 'The next election by the people' does not mean the next general election, or the next election held by the people, but it must

mean that the appointee shall hold until someone has been elected to fill that office. But there is nothing in this provision which indicates when this election shall be held, but only that until someone has been elected to fill the vacancy the appointee shall hold. This section does not direct that such election shall be at the next general election. It provides simply for filling vacancies by appointment, and that such appointees shall hold until the office is filled in the manner provided by law; but does not itself provide for such election, or direct when it shall be. If, however, the phrase 'the next election by the people,' is equivalent to the phrase 'the next election,' and we assume that it was intended thereby to indicate the election at which such vacancy would be filled, we would feel compelled to hold that the next election is that which the constitution has provided for filling that particular office, that is, the next gubernatorial election."

In *State ex rel. Livesay v. Smith*, 35 Mont. 523, 90 Pac. 750, the court had under consideration a similar case, the constitutional provision being that the appointee should hold his office "until the next general election or until their successors are duly elected and qualified." The question was resolved as it was resolved by the supreme court of California, the reasoning of the court being as follows:

"The main question to decide here is: What is the meaning of the phrase 'the next general election' as employed in this act? Respondent contends that it means the next general election held for any purpose, while appellant's claim is that is means the next general election at which a clerk of the district court would be elected in conformity with established law. . . . It may be admitted, as a basis for an argument, that the legislature had power to provide specifically that the appellant should hold his office by appointment until the general election for 1906, when his successor should be elected to hold until the following general election; but this does not assist us in answering the question here involved. The question here is: What did the legislature mean when it used the general language it employed, in view of the constitutional provisions fixing the term of office and time of election of clerks of the district courts generally? The legislature is presumed to have been familiar with the constitu-

tional provisions quoted, and we are therefore satisfied that in not providing specifically for the election of clerk of the district court in November, 1906, it intended that the appointee should hold until the present term of the judge of that district expired."

It seems to us that the rule under our constitution is consistent with that declared in the above cases, especially so when it is considered that care was taken to fix not only the terms of the several state officers, but the particular time at which they shall be elected. The words "the first election of all state officers . . . shall be on the Tuesday next after the first Monday in November, 1892, and the elections of such officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November," can mean only one thing, that is that elections for the several state offices shall occur, and shall occur only, on the first Monday in November, 1892, and every fourth year thereafter. The constitution designedly omits the usual provision "next election," or its equivalent, and likewise fails to provide for special elections to fill vacancies; but if the construction contended for by the relator be adopted, there would be in effect a special election in so far as the office of secretary of state is concerned. The fact that the voting occurred at a general election would not deprive it of that character. It is not necessarily the time or manner of holding an election to fill a vacancy that makes it a special election, but the fact that it is held at a time other than the time fixed by law to elect an officer for the regular or defined term.

In the syllabus to *Kenfield v. Irwin*, 52 Cal. 164, the following definitions will be found:

"General election:—A general election is an election held to select an officer after the expiration of the full term of the former officer.

"Special election:—A special election is an election held to supply a vacancy in office occurring before the expiration of the full term for which the incumbent was elected."

An election does not follow by reason of the fact that there-

has been a vacancy and an appointment. Although this assumption is prevalent, it is not sustained by any authority, for the law is that elections are no longer a *viva voce* expression of the people voluntarily assembled, but from the necessities arising out of greater populations, must be held in strict conformity with some statute or the constitution. So the rule has been declared to be that elections can only be held when affirmatively authorized by law; and, although we followed relator in his construction of the constitution, he would yet be without remedy, for neither the constitution nor the statutes of this state authorize the election of any officer of the executive department at the next election, or at any election held in a so-called off year.

Garoutte, J., concurring in the case of *People ex rel. Lynch v. Budd, supra*, although questioning the construction put upon the words "next general election" by the majority, said:

"For, though the appointee's commission expire at 'the next election by the people,' still, in the absence of some law authorizing the election of a lieutenant-governor at that time, no election can be held, as I find no such law. A provision of the constitution or statute declaring a certain day upon which the commission of an officer shall expire, is in no sense a provision that an election shall be held upon that day to fill the office. Under these conditions the present appointee of the governor will hold until his successor is elected and qualified, regardless of the day upon which his commission may expire; and his successor can only be elected at a time fixed by law, which time will be at the regular state election in the year 1898."

To the same effect is *People ex rel. Cloud v. Wilson*, 72 N. C. 155; *Sawyer v. Haydon*, 1 Nev. 75; *State ex rel. Daggett v. Collins*, 2 Nev. 351; *State ex rel. McGee v. Gardner*, 3 S. D. 553, 54 N. W. 606; *Wainwright v. Fore*, 22 Okl. 387, 97 Pac. 831.

In further support of our judgment, it will be noticed that the constitution does not say that the officer shall hold until *his* successor is elected, but that the appointment shall expire

when *a* successor is elected; meaning, no doubt, a successor to the term and not to the person. No provision being made for the election of a secretary of state except in the years fixed by the constitution, the next regular election for that office would occur in 1912, until which time, and until the one then elected shall duly qualify, the present incumbent is entitled to hold the office. The fact that the constitution is careful to provide for the filling of vacancies in judicial offices at the next general election, and has made no such provision for other state offices, is an evidence of the intention of the people to preserve, in so far as the administrative offices of the state are concerned, the harmony of their tenure and the time of their selection. The following cases throw some light on the question before us: *People ex rel. Murphy v. Col*, 132 Cal. 334, 64 Pac. 477; *Wainwright v. Fore*, *supra*; *State ex rel. Attorney General v. Phillips*, 30 Fla. 579, 11 South. 922. The relator relies upon the following cases: *State ex rel. Welsh v. Mechem*, 31 Kan. 435, 2 Pac. 816; *State ex rel. Whitney v. Johns*, 3 Ore. 533, and *State ex rel. Weeks v. Gamble*, 13 Fla. 9.

The Kansas case is of doubtful authority, when considered in connection with the later expressions of the same court. But if it be otherwise, the controlling element in the case was a statute which provided that all appointments to fill vacancies should continue "until the next general election and such vacancy shall be filled by an election." The Oregon case may sustain the contentions of the relator, but if it does, it is contrary to all of the more recent authorities. It was there held that an office is in the nature of a personal franchise; that an election to fill a vacancy shall occur at the next general election, and that the one elected holds, not for the unexpired term, but for a full constitutional term, four or six years, as the case may be. This would be contrary to the spirit of our constitution, which seems designed to effect uniformity of elections for state officers. The dissenting opinion of Judge Strahn, in *Baker v. Payne*, 22 Ore. 335, 29 Pac.

787, is in harmony with our holding that no election can occur although a general election be held, unless it is provided by law that such officer shall be elected at that time. The Florida case, like the Oregon case, was grounded upon the earlier California decisions, and is at variance with the general rule and probably with the later expressions of the same court.

The writ is denied.

RUDKIN, C. J., FULLERTON, GOSE, MORRIS, CROW, and PARKER, JJ., concur.

[No. 8376. *En Banc.* August 6, 1910.]

PORT BLAKELY MILL COMPANY *et al.*, *Respondents*, v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, *Appellant*.[1]

CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—DOING BUSINESS IN STATE. A foreign corporation, to which a policy of fire insurance is made payable in case of loss, may maintain an action on the policy without having paid an annual license fee or otherwise complied with the laws relating to the doing of business in this state by foreign corporations.

INSURANCE—FIRE INSURANCE—POLICY—WARRANTIES — SPRINKLER SYSTEM—TEMPORARY SUSPENSION. The temporary violation of a "sprinkler" clause in a fire insurance policy, whereby it was "warranted" that due diligence be used that the automatic sprinkler system shall at all times be in good working order, does not prevent a recovery on the policy, where such temporary suspension of the working order of the system was not in existence at the time of the fire and the damages were not the result of the breach.

SAME—POLICY—CONSTRUCTION—"WARRANTY"—USE OF WORD. A policy of insurance is to be construed in the light of the intent of the parties, and the use of the word "warranted" adds nothing to the force of a stipulation that does not necessarily constitute a warranty; especially in view of the rule that the courts should, in case of any doubt, lean against any construction that imposes upon the assured the obligation of a warranty or where it would work a forfeiture, unless it plainly appears that such was the intention.

[1]Reported in 110 Pac. 36.

SAME—POLICY—CONSTRUCTION—SPRINKLER CLAUSE. A "sprinkler" clause in a fire insurance policy whereby the assured "warranted" that due diligence be used that the automatic sprinkler system shall at all times be in good working order, will not be construed to be a warranty, working a forefeiture of the policy for its temporary violation at a time other than when the loss occurred, where the policy expressly provided that for the violation of several other stipulations on the part of the assured the policy should be void and immediately cease, and made no such provision in connection with the sprinkler clause; this, on the principle of *expressio unius est exclusio alterius.*

SAME—BREACH OF SPRINKLER CLAUSE. A policy warranting that diligence shall be used that an automatic sprinkler system shall at all times be in good working order, does not warrant that the system shall be in good working order at all times; and the defense of breach of warranty, because of a temporary suspension of the system while repairs were being made, is not available where the court finds and all the evidence shows that due diligence was at all times used and that the system was in good working order at the time of the fire.

MORRIS, J., dissenting.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered May 5, 1909, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action on a fire insurance policy. Affirmed.

H. T. Granger and *Hughes, McMicken, Dovell & Ramsey*, for appellant.

Hastings & Stedman, Walter S. Fulton, C. D. Sutton, and *Titus & Creed* (*Dorr & Hadley*, of counsel), for respondents.

ON REHEARING.

DUNBAR, J.—Action on fire insurance contract. Judgment was obtained in the superior court by the insured, respondents in this case, on a fire insurance policy issued by the appellant. An appeal followed, and the judgment was reversed by a majority decision of Department One of this court, filed January 14, 1910, to which reference is made for a statement of the case. 56 Wash. 681, 106 Pac. 194. A petition for rehearing was filed, addressed to the court *en*

banc. Said petition was granted, and the case again argued, and it is now here for final determination by the whole court.

There were three contentions made by the appellant in the first argument of the case: (1) That the Detroit Trust Company could not have maintained this action; (2) that the policy was avoided by the breach of a warranty therein contained; and (3) that the automatic sprinkler system connected with the mill plant was not in working order at the time of the fire. It was stated in the opinion that each of these contentions had been considered, but that, in view of the conclusion reached on the second, the first and third would not be discussed. Inasmuch, however, as the first proposition lay at the threshold of the case and was determinative of the right to bring the action, the court must have decided that proposition against the contention of the appellant before it proceeded to the determination of the second proposition. In any event, we think the technical objection is without merit, for all the reasons urged by respondents. We have given painstaking consideration to the third proposition, for it involves the actual merits of this controversy. But from an examination of the long statement of facts, containing more than six hundred pages, we are not convinced that the findings of the trial judge were not sustained by the weight of the evidence, and will therefore consider the case from the standpoint of such findings.

The sprinkler provision, appearing on a rider attached to the policy, was as follows:

"Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order."

Privilege was given the assured to make additions and repairs. The fourteenth and fifteenth findings of the court bearing on this proposition are as follows:

"(14) That on or about the 29th day of January, 1907, it became and was necessary, essential, and requisite to the alterations, and repairs be made to that portion of said plain-

tiff's sawmill building, which was known as the lath mill, and business of the Port Blakely Mill Company that an addition, on or about April 1st, 1907, it became and was necessary—in order to make the automatic sprinkler equipment more efficient, and in order to extend the automatic sprinkler equipment to the addition to that portion of said plaintiff's mill building known as the lath mill, and in order to have all of said sawmill building, including said lath mill, protected by automatic sprinkler equipment—to make additions, alterations, and repairs to what was known as the No. 3 automatic sprinkler division in the easterly portion of said sawmill, and that accordingly, on or about the 29th day of January, 1907, the plaintiff, Port Blakely Mill Company, commenced the work of making said addition, said alterations and repairs to said lath mill, and on or about April 1, 1907, commenced the work of altering, repairing, and extending said No. 3 automatic sprinkler division to the new portion or addition to said lath mill, and for that purpose, it was necessary, essential, and requisite that the water be wholly turned off of said No. 3 automatic sprinkler division, and that said repairs and alterations could not be made to said sprinkler division and said extensions thereof could not be made, unless the water was turned off of said division. That said repairs could not safely be made while said plaintiff's sawmill was in operation; that plaintiff, Port Blakely Mill Company, on or about April 1st, 1907, had progressed with the work of said additions, alterations and repairs to said lath mill sufficiently to enable it to operate said lath mill, and accordingly the lath mill was put in operation after said date. That said Port Blakely Mill Company continued with the work of making said repairs and alterations and extensions to said sprinkler division with due diligence, and at all times used due diligence that the automatic sprinkler system should at all times be maintained in good working order; and on April 21, 1907, the said alterations, repairs, and extensions to said sprinkler division were so far completed that the water was wholly turned on in said sprinkler division No. 3; that said water was turned on until and during said fire, No. 3 automatic sprinkler system, and all other divisions of said plaintiff's sprinkler system in said mill, were supplied with water in such quantities and with such pressure, that the heat produced by said fire in and about said mill did melt and release

said sprinkler heads attached to said No. 3 automatic sprinkler division and all other parts of said sprinkler system in said mill, and permitted the water to flow through the same and out through the pipes distributed throughout said mill, and caused said water to be sprinkled upon said fire. That said sprinkler system in said mill, in all its parts and divisions, was in good and thorough working order at the time of and during said fire.

"(15) That said fire originated under what was known as sprinkler division No. 4 in said sawmill building of said Port Blakely Mill Company immediately to the westerly in said mill building of said sprinkler division No. 3 aforesaid; and said fire did not originate in said sprinkler division No. 3 aforesaid; said fire originated at what was known as the friction pulley of and under the burner conveyor on the main floor beneath the sawing floor of said sawmill, and spread immediately on belts and pulleys above the sawing floor to the roof of said sawmill building, causing the sprinklers in the roof of said mill to operate as the fire reached the roof; but said fire rapidly spread beyond the control of said sprinklers."

So that it must be conceded, that there was no lack of diligence; that the sprinkler system was in operation at the time of the fire; that the violation of the contract, if there was any violation, was not the cause of the fire, and that the fire did not even originate in the sprinkler division where the repairs had been made. It must, therefore, readily be seen that, if our former opinion is sustained, it will not be upon any equitable ground, but by reason of sustaining the hard and inflexible rule contended for by appellant, that the covenant or agreement in this case amounted to a warranty or a statement of a condition precedent, a temporary violation of which would preclude a recovery, even though it affirmatively appear that such temporary suspension was not in existence at the time of the fire and could not possibly have been the cause of the fire. This rule seems to be opposed to our primary conception of fair dealing, is not practiced or tolerated in our everyday affairs with each other, is not a commendable rule of action under any circumstances, and is

diametrically opposed to the general rule that only such damages can be recovered from the breach of a contract as are shown to be the result of such breach. This rule has stood the test of time, because it is based upon common sense and fair dealing, and no court has ever felt called upon to apologize for it or distinguish it out of existence.

Of course, it is fundamental that courts cannot make contracts for parties, and it follows that they must enforce such contracts as are made; but in interpreting contracts, they should not be bound by hard and fast rules or definitions which evidently were never within the minds of the contracting parties. Insurance contracts, like all other contracts, should be construed with reference to what the parties meant, when interpreted in the light not only of the language employed, but of the evident object of the contract, the benefits secured on one hand, the perils or risks sought to be avoided on the other. They should not be so construed as to work a forfeiture of either party's rights, or to defeat the very object of the contract for which a price has been paid, unless it plainly appears that such was the intention of the contracting parties, and that the effect of the language of the contract was well understood by them when the contract was entered into; and it ought in reason to be a sign to the court that there has been a misapprehension on the part of the contracting party whose rights are thus contracted away that the contract was not understood. Especially is this true in this character of contracts, where the language of the contract is the language of the insurance company whose duty it is to see to it that, where unreasonable and one-sided provisions are incorporated into a contract, the contract is understandingly entered into.

This was the rule of interpretation indorsed by this court in *Poultry Producers' Union v. Williams*, 58 Wash. 64, 107 Pac. 1040, referred to by appellant in its reply brief in support of the contention that it was the settled law of this state that the breach of a warranty rendered the policy void

even though the breach may have ceased at the time of the loss. Of course, the ordinary expression was indorsed that the truth of a warranty is a condition precedent, and there is no real objection to this statement if it means that the insured intended the representation to be a warranty which would render his contract void whether it was the cause of the loss or not. But to render a decision valuable on any given point, it is necessary to be informed what the case was which the court was deciding, and to construe the language used with reference to the facts discussed. That was an action by one Williams, an employee of the Poultry Producers' Union, who was afterwards made secretary-treasurer and manager of the company. In this position a fidelity bond was required, and an application was made and signed by the president of the company. Among other questions asked and answered were the following: "(13) When were his accounts last examined? A. September 11, 07. (14) Were they at that time in every respect correct and funds on hand to balance? A. Yes. (15) Is there now or has there been any shortage due you by bondsmen? A. No." And the application contained the stipulation that: "It is agreed that the above answers are to be taken as a condition precedent and as the basis of the said bond applied for." It was further conditioned that, "if the employee's written statement hereinbefore referred to shall be found in any respect untrue this bond shall be void." It occurred that the answers to some of the pertinent questions were not true, and the insurance company resisted the payment of the policy on that ground; and the court said, in passing upon the question:

"Whether the answers made by the applicant for a policy of indemnity or insurance are warranties or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk."

It will be seen, that in that case the company had no way to guard against the representation; that it certainly was

material to the risk, and continued to be material to the risk, for it affected the reputation and character of the party upon whom the risk was placed. This was a risk that would be a continuing risk running throughout the life of the insurance, a different proposition altogether from the one at bar, where, if there had been a violation of a condition at some time past, such violation had ceased at the time of the loss, and could not possibly, in any event, have had any effect upon the loss.

In this connection counsel for appellant also relied upon *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866. That also was a case where the defense was meritorious, the risk having been taken on representations concerning the health of the applicant, and it afterwards appearing that the representations were not true, the company refused to pay the policy. There could have been no suspicion of the violation of the representations in this case, for if the representations were not true, as we have just remarked in the other case, their effect would be to follow the risk through the life of the assured, and to finally effect the loss. It is true that the court, in discussing the case, said:

"The rule is that, when a representation made by an applicant for insurance is carried into a contract and expressly made a part of it, it becomes a warranty, and its materiality is settled by the agreement of the parties";

citing Elliott on Insurance, § 102. But that statement must have been made with reference to the facts in the case, and the writer of the opinion could not have meant to convey the idea that it would apply to all cases even where there was a discontinuance of the violation, for the same authority cited, viz., Elliott on Insurance, in § 205, expressly says that such is not the rule under the weight of authority. Section 205 is as follows:

"The decisions are conflicting upon the question of the effect of a violation of a condition in a fire insurance policy. The weight of authority seems to support the view that a

violation of a condition that works a forfeiture of the policy merely suspends the insurance during the violation, and if the violation is discontinued during the life of the policy and does not exist at the time of the loss, the policy revives and the company is liable, although it had never consented to the violation of the conditions in the policy, and such violation has been such that the company could, had it known of it at the time, have declared a forfeiture therefor."

But this question has been decided by this court in *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86, and decided on principles applicable to and necessary to the decision in this case. In that case the stipulation was as follows:

"It is understood and agreed that during such time said mill is idle, or not in operation, a watchman shall be employed by the insured to be in and upon the premises constantly, day and night."

The contention of the appellant was that the terms of the policy constituted the measure of the insurer's liability and, in order to recover, the insurer must show himself within these terms. In other words, the compliance of the insured with the terms of the contract was a condition precedent to the right to recover, and the court instructed the jury that, if they believed from the evidence that at any time during the existence of the policy the assured failed to keep a watchman while the mill was not in operation, plaintiffs could not recover, adding "unless you further find from the evidence that said fire was not due to, or the result of, their failure to keep such watchman." That instruction was sustained by this court. The stipulation or representation made in that case was as strong as the representation made in this case, with the exception that the word "warranted" is used in the case at bar, instead of the words "it is understood and agreed." Here it is "warranted" that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order. There it was "understood and agreed" that such and such things should be done.

In our judgment the word "warranted" adds nothing to the force of the stipulation. It is well understood—in fact, it is conceded—that the expression of the word "warranty" does not necessarily constitute a warranty; that there may be warranties without the use of the word; that there may not be warranties when the word is used. In Charles Dickens' Child's History of England, in a review of the character of Lord Dunstan, the author said that, after he died, the people called him a saint; but naively remarked that calling him a saint did not make him a saint, any more than calling him a coach horse would make him a coach horse. And so it is with the stipulation in this case. The word "warranty" is of such general signification and of such general and discursive use that the expression as used here is absolutely without any legal signification. It is common for people in ordinary conversation to say that "I will warrant this" or "I will warrant that," or "I warrant this," "I warrant you" that so and so will happen, or will not happen, when there is no intention whatever on the part of the speaker to bind himself to make good the expression. The rule of construction must be that the word used is to be construed in its ordinary signification. The legal signification may have been understood by the insurance company when it employed this word, but in order to avail itself of such legal signification, it must appear that the other contracting party also understood it. While there may have been some things said in the discussion of the *Hart* case, as there generally is in the discussion of cases, which were not material to the decision of the case, a review of it will show beyond question that the essential idea in the case was the same as the essential idea here, viz., whether, by reason of a breach which did not continue, the policy was avoided. The court, in discussing the case, said:

"In an ordinary contract no damages can be recovered by reason of a breach, if the breach does not result in damage. In this case, if the rule contended for by appellants should

prevail, if the respondents had failed or neglected to keep a watchman for one day, and the mill had not burned for a month afterward, and it positively appeared that the fire was in no way attributable to such neglect or breach, the company could escape its liability by reason of a breach which was entirely immaterial and which in no way contributed to the damage."

It will be seen that this language is especially applicable to the case at bar, where it appears affirmatively from the findings of the court that the fire was in no way attributable to the breach in relation to the maintaining of the sprinkler system, and that such breach had been corrected before the fire. Again, it was said in that case, that

"The rule is universal that statements contained in the application will not be construed to be warranties if elsewhere in the contract there can be found reason to suppose that such was not the clear understanding of the parties";

and the court proceeded to show, by other provisions of the contract, that such could not have been the understanding.

So in this case, as showing that it was not the intention of the contracting parties that the representation in regard to the sprinkler should not work a forfeiture of the contract or render it void, there are certain statements or provisions and representations made in the contract in which it is especially provided that a forfeiture or avoidance of the contract shall be the result. For instance, in the watchman clause, after stating as does the sprinkler clause, that "it is warranted by the insured that whenever any of the following named parts of the plant," etc., shall be idle, it is stated that, "if any of the above named parts is idle or not in operation for a period of more than thirty days without the written consent of the company, this policy shall be void." The same provision substantially is in the "reduced rate average clause," the language being:

"In consideration of the reduced rate at which this policy is written it is expressly stipulated and made a condition of this contract that this company shall be liable for no greater

proportion of any loss than the amount hereby insured bears to seventy per cent of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon."

The term "made a condition of this contract" is probably equivalent to a stipulation that the contract shall be void if the condition is violated. Again, there is the following stipulation:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the substance thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud," etc.

There would be nothing unconscionable in construing such provisions or stipulations in a contract of this kind as warranties, for the concealment or misrepresentation of any fact would work an actual hardship upon the insurance company. Again, it is provided:

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease"—

another reasonable provision which is stated so definitely that there is left no room for controversy as to what was meant. Again:

"This policy may by a renewal be continued under the original stipulation, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void"—

another positive expression concerning the avoidance of the contract, based upon reason and good conscience. In the *Hart* case, *supra*, certain similar conditions were reviewed, and the court held that, under the rule of *expressio unius est exclusio alterius*, the particular clause could not be construed to be a warranty. That rule applies with especial clearness

to this case, where so many provisions provide especially that the contract shall be void if they are not complied with, and where there is no such provision in the representation relied upon. In that case, quoting from May on Insurance, § 164, it was said:

"They are not necessarily warranties because they appear on the face of the policy. In order to have the force of a warranty, the statement must indeed constitute a part of the contract; but it by no means follows that every statement which constitutes a part of the contract is therefore a warranty. Whether they are so or not will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument."

That quotation is also expressly applicable to this case, for contrasting the form of the expression used in this representation relied upon and the form of expression used in the other representations which we have noticed, and considering the relation of the stipulation discussed to the other parts of the instrument, it must appear that it was not the intention of the parties to constitute the representation a warranty. That case has stood as the law of this state since its announcement in October, 1894, up to the time that the opinion was rendered in this case, and should not now be abrogated without being specially overruled.

But, in view of the fact that we are called upon to overrule an opinion announced by a department of this court, we will examine the authorities generally, and especially those relied upon in the opinion to sustain the decision, with a view to ascertaining if the cases cited, in consideration of the facts of the cases which were before the court, actually do sustain the appellant's contention. In the first case cited, viz., *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, 59 Am. Dec. 192, it will be found that it was expressly stipulated that, under certain conditions, the insurance should be void and of no effect. In addition to the fact that the policy pro-

vided that, if any misrepresentations were made, the policy should be void and of no effect—a statement which is not in the provision under discussion, the decision was against the contention of the insurance company, the court saying:

"The defendants, relying upon a violation of the statements in the application, contended that these statements were warranties or conditions, and if they were not strictly and literally true at the time of the application, that the policy was void; and that if they were then true, and the plaintiffs afterwards ceased to comply with them, the policy thereupon became void, whether the same were or were not material to the risk. But the presiding judge instructed the jury, that the statements of the application were not warranties, requiring an exact and literal compliance, but that they were representations; and as such, must have been substantially true and correct as to things done, or existing, at the time the policy was issued, and that so far as they related to the future—to the things to be done, and rules and obligations to be observed—they were stipulations, to be fairly and substantially complied with."

The supreme court said:

"The court are of opinion, that looking at the policy and the application, this instruction was correct."

Then follows a portion of the quotation set forth in the opinion:

"There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties, and what representations."

In Cooley's Briefs on the Law of Insurance, page 1133, that author says:

"In accordance with the principle, discussed in subdivision (b) that warranties are part of the policy, it may be laid down as the well-settled rule that, subject to qualifications to be discussed hereafter, all statements regarding the risk, contained in or appearing on the face of the policy, are warranties."

But the qualifications thereafter discussed render the rule

announced almost without value, for no court has gone to the extent of holding that all statements regarding the risks contained in or appearing on the face of the policy are warranties; and the cases cited by Cooley to sustain the announcement made in the text treat mostly upon the qualifications which are mentioned in the citation, and hold almost uniformly that, where there is any doubt as to whether a statement in an insurance policy is an express warranty, the court should lean against that construction which imposes upon the assured the obligation of a warranty. In one of the cases cited, *National Bank v. Union Ins. Co.*, 88 Cal. 497, 26 Pac. 509, 22 Am. St. 324, it was held that, although the code of that state provided that a statement in a policy of a matter relating to the person or thing insured or to the risk as a fact is an express warranty, if taking the entire policy in all its terms and language it can be seen that such was not the intention of the parties, the statement of fact cannot be deemed an express warranty. *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751, does not, either in principle or in the facts, sustain the opinion. There the court laid down the general rule that a stipulation in an application for fire insurance should be construed in a doubtful case most strongly against the insurer by whom it was framed; and that, in a doubtful case, that construction of a contract which will save it is to be preferred to one which will destroy it; that the use of the word "warranty" in a contract does not necessarily control its construction; there may be a warranty without the use of that word, and its use will not always create one; that the stipulation in the policy, that the application shall be considered a warranty by the insured, must be construed to mean such a warranty as is stipulated in the application itself. In that case, in answer to the question, "What material was used in lubricating the machinery?" the assured answered: "Lard and sperm oil"; and to the questions whether the machinery was regularly oiled and, if so, by whom and

how often, the answer was: "Yes, by engineer and miller, as often as necessary." The proof was, that during the whole life of the policy, an oil known as "Fine Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person specially employed by plaintiffs for that purpose. The circuit court held that the answers to the above questions were absolute and continued undertakings in the nature of express warranties, and that the failure by the plaintiffs to use lard and sperm oil and to have the machinery oiled by the engineer and miller invalidated the contract of insurance, and released the defendant from any and all obligations under it, and the plaintiff was nonsuited. This judgment was reversed by the supreme court, the court saying:

"The stipulation was framed by the insurer, and had it been intended to require the insured to go beyond the interrogatories and disclose facts not called for therein (if any existed) material to the risk, a general interrogatory calling for such facts would have been inserted; or, at least, the stipulation would have been framed to express that intention more clearly. We cannot assume that the insurer would leave its intention in that behalf to rest in uncertain and doubtful inference, when it was so easy to express it clearly and unmistakably."

In *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92, while the court laid down and indorsed some of the most radical rules, going so far as to state, that any statement or description, or any undertaking on the part of the insured, on the face of the policy which relates to the risk, is a warranty, and that whether this is declared to be warranty *todidem verbis* or is ascertained to be such by construction, is immaterial; that in either case it is an express warranty and a condition precedent; yet, as we have before indicated, to avoid the harshness of this rule, the court discriminated the facts in the particular case involved and decided the case in favor of the plaintiffs.

In *Moulor v. American Life Ins. Co.*, 111 U. S. 335, the court reaffirmed the doctrine that, when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. This contention arose out of answers to certain interrogatories in relation to the health of the applicant and the health of his ancestors, he having answered that his father, mother, brothers, or sisters had not been afflicted with consumption or any other serious family disease such as scrofula, insanity, etc., since childhood, and that there were no circumstances which would render an insurance on his life more than usually hazardous. He also answered that as an applicant he "reviewed the answers to the foregoing questions, clearly understood them, and reaffirmed the answers"; and at the close of the series of questions was the following stipulation:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company."

Notwithstanding this strong expression on the part of the appellant, the court held that, in the absence of explicit, unequivocal stipulations, requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void and all premiums paid thereon forfeited if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some of the diseases mentioned in the question

to which he was required to make a categorical answer, saying that:

"If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion";

and reversed the judgment of the lower court which held that he could not recover.

Wood on Fire Insurance simply states the general rule which is contended for by the appellant, only as decided by certain cases. We have been unable to obtain Marshall on Insurance, but as near as we can gather from quotations, the harsh and inflexible rule sought to be invoked by the appellant has been supported by courts which drew their conclusions from this old work from which a majority of the courts have receded. In *McKenzie v. Scottish Union & National Ins. Co.*, 112 Cal. 548, 44 Pac. 922, the decision was based upon an absolute condition stipulated, and with the stipulation that, if the building should remain shut down for more than thirty days without notice, the policy should be null and void. The condition was broken without any excuse, and the court held that the provision was a warranty. In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, the policy provided that it should become void if, without notice to the company and its permission indorsed thereon, mechanics were employed in building, altering, or repairing, and it was held that a violation of this worked a forfeiture of the policy under the express stipulation of the policy that

"This policy shall be void and of no effect if, without notice to this company and permission therefor in writing indorsed hereon. . . . the premises shall be used or occupied so as to increase the risk . . .or the risk be increased . . . by any means within the knowledge or control of the assured, . . . or if mechanics are employed in building,

altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

It is unquestionably true, however, that there are cases, though not by any means a majority of the hundreds of cases that have been decided upon this question, that hold to the strict rule contended for; but in grateful contrast to those courts which adopt the rule of strict construction by, it seems to us, making a fetich of words, expressions, and definitions, and attributing potent magic to the word "warranty," or words of similar import, comes like a refreshing breeze from the sea of judicial enlightenment, the voice of the supreme court of Kentucky, in *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, where the rule is condemned. In the course of the opinion it was said:

"There is no doubt that an insurance company relies upon the truth of the representations made in either case, and equally certain that, if untrue and material to the risk, no inquiry will be directed for the purpose of determining whether the statement was fraudulently or innocently made. The injury to the insurer is the same, but when no injury can possibly result to the company, where is the breach and what is the penalty? It would certainly be no breach of warranty in a chattel if the quality was better than that warranted, unless the inferior article alone would conform to the wants of the purchaser; and if a breach, the damages would be merely nominal; but in regard to insurance contracts, that it neither increases nor diminishes the risk, and which could not have influenced the action of either party in making the contract, is seized upon as a ground for forfeiting the entire policy and depriving the assured not only of the benefits of the contract, but permits the insurer to retain all the premiums paid. . . . Such contracts are to be interpreted like other agreements, and must be governed by the same rules, good faith being especially required, as one of the parties is necessarily less acquainted with the details of the subject of the contract than the other."

The defense in this case was raised because the applicant had made a mistake as to the age at which his father and

mother died; and had also violated the provisions of the contract in relation to going outside of certain territory for a limited time, which was forbidden by the contract.

In *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer (N. Y.) 490, where a clause in the policy of insurance declared against the use of camphene, etc., it was held that there was no evidence that the loss resulted from the use of camphene, and if there was no other evidence than the breach of the alleged warranty, the plaintiff was entitled to judgment. Said the court:

"If the use of camphene was meant to be prohibited in the same sense as the storage of gunpowder, we can discover no reason why the prohibition was not express, in the one case, as well as in the other. Had the intent been the same, it seems to us that such would have been the language; . . ." and so in the case at bar. Had the intent been to make a warranty of the stipulation in relation to the sprinkler, it would have been so expressed as it was in the other clauses above mentioned.

The case of *Au Sable Lumber Co. v. Detroit Manufacturer's Mut. Fire Ins. Co.*, 89 Mich. 407, 50 N. W. 870, was cited by this court in the case of *Hart, supra*, and it was there said: "If it was intended that any failure to keep a watchman rendered the policy void, the parties would have so declared." That case was expressly in point in the case considered, and we think is as clearly in point in this case. To the same effect is *McGannon v. Michigan Miller's Mut. Fire Ins. Co.*, 127 Mich. 636, 87 N. W. 61, 89 Am. St. 501, 54 L. R. A. 739. *Selby v. Mut. Life Ins. Co.*, 67 Fed. 490, was practically the same kind of a case, where the parties had fixed the penalty for breach of warranty by stipulations in the contract in relation to some things, but not in relation to the matter which constituted the defense. In *Phoenix Assur. Co. of London v. Munger Improved Cotton Mach. Mfg. Co.* (Tex. Civ. App.), 49 S. W. 271, it was decided that a temporary breach of a stipulation in a

policy to which there was not attached a specific forfeiture, which breach did not exist at the time of the fire loss, and which did not contribute thereto, does not prevent recovery on the policy. The appellant contends that this case is not applicable to the case at bar, but it seems to us that the case is exactly applicable, both as to what is stated in the opinion of the court, and as to the matters decided. In *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.*, 76 S. C. 76, 56 S. E. 654, 121 Am. St. 941, 10 L. R. A. (N. S.) 736, where an insurance policy provided that an increased hazard within the knowledge of the insured would avoid the policy, the owner of the building insured rented to a tenant a portion thereof to be used for a business more hazardous than contemplated by the policy, and it was held not to avoid the policy, because the temporary hazard ended without loss and the loss occurred from another source, the court saying:

"And if a temporary change of possession increasing the risk while it lasts, but discontinued before the fire, does not totally avoid the policy, but simply suspends it during the prohibited use, the provisions of the policy above quoted cannot avail the defendant."

This case answers the contention that is made much of, that by reason of the provision in the policy that the sprinkler system should be employed, the insured obtained insurance at a considerably less price than he could have obtained it for if there had been no such provision. But it seems to us there is no merit in this contention, for the reason that the limited price was accorded to the insured because, by reason of the installing of the sprinkler system there would be less liability of fire, the object and efficacy of the system being to put out incipient fires. It may have been that that object was attained in this case many times before the fire which had occurred, through the agency of this sprinkler system. But, in any event, the object was attained and inured to the benefit of the insurance company, when it is conceded that the sprinkler system was in vogue and in good running order at the time of the fire; and when

it must be further conceded that, if it had not been installed at the time of the fire the insured could not have recovered at all. The case just quoted, in the course of its argument, says:

"The reasoning in *Kyte v. Ins. Co.*, the Massachusetts case just referred to, is that, unless the policy be regarded as at an end the moment the hazard is increased, the insurance company would be held to furnish insurance for which it had not received the compensation it was entitled to demand and which with knowledge of the facts it would have demanded. But this reasoning seems fallacious, for the insurer is generally held to be not liable at all if the fire occurs during the continuance of the increased risk and in consequence of it."

Appellant, in its reply brief, answers this case by saying that no warranty was involved in it, and there was no discussion therein of the law of warranty; but there was a decision of a case which involved the identical question which is presented in this case. The underlying principle was discussed and decided without, possibly, any mention of the word "forfeiture," and it is really a more helpful case in determining the question under discussion than if it had been hampered by a discussion of terms and expressions. In *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221, where a policy of insurance provided that, should the premises insured be applied during the term of insurance to any prohibited use, the policy thenceforth, and so long as the same should be so prohibited and applied or used, should cease and be of no force or effect, it was held that the application of the property to a prohibited use within the term would not affect the right of the assured to recover in case of a loss, if at the time of the loss the property was not being so improperly applied or used, and it did not appear that such antecedent misapplication or use increased the risk or contributed to the loss.

In *Schmidt v. Peoria Marine & Fire Ins. Co.*, 41 Ill.

295, it was held that, where it was provided in a policy of insurance, that:

"If, after insurance is effected, either by the original policy or the renewal thereof, the risk be increased by any means, or occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect,"

these words are construed to mean that the policy shall become inoperative only while the increased risk shall be in existence, and when it terminates, the liability of the company shall recommence. This case was reaffirmed in *Insurance Co. of North America v. McDowell & Brown*, 50 Ill. 120, 99 Am. Dec. 497. In *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595, it was held that the change of the use of an insured building increasing the hazard will not prevent recovery, where such use has been abandoned without the declaration of a forfeiture by the company before a loss occurred, and such increase of the hazard in no way continued to affect the risk at the time of the loss, although there had been a stipulation that there should be no increase of hazard. The language in that stipulation was plain and emphatic, being as follows:

"If the assured shall fail to make known to the company at once any fact or circumstance which renders the risk more hazardous than at the time of the insuring, or if the hazard be increased by any means within the control of the assured, or if gasoline or petroleum or any of its products are deposited, used or kept, or burning gas is made, generated or carburetted within the building or contiguous thereto, then and in every such case this policy shall be void, unless consent is endorsed by the company thereon."

It was contended by the learned attorney for the insurance company in that case that the case which we have just cited from Illinois had been determined upon the authority of *New England Fire & Marine Ins. Co. v. Wetmore, supra*, and that that case had not really determined the questions raised in the subsequent cases and the question which was raised

in the case of the *Traders Ins. Co. v. Catlin*, now under consideration. But, notwithstanding that contention, which seems to have some merit in it, the court refused to retreat from the principles announced in the subsequent cases, and emphatically held that the representation was not a continuing one and did not avoid the policy. It is contended by appellant, as in the preceding case, that the court in Illinois was not considering a warranty, and that there was no discussion in the opinion as to a breach of warranty, and no reference whatever made to the law of warranty. But we have the same answer to make to this criticism that was made *supra*. It is insisted, however, that the supreme court of Illinois in the case of *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 68 N. E. 551, expresses the view of the supreme court of that state on the subject of forfeiture. This case is also cited by appellant in its reply brief, but an examination of the case shows that it in no way contravenes the doctrine just cited. There the policy provided that it should be void if gasoline was kept on the premises excepting by permission, and the testimony shows that not only was gasoline kept on the premises between the time that the policy was issued and the time of the fire, but that it was on the premises at the time of the fire. The court in its opinion stated that that proposition had been firmly established and undisputed, and that the burden could not be thrown upon the insurance company to prove that the fire was attributable to the unlawful storing of the gasoline in the house. This opinion seems to be in consonance with both reason and authority.

In *Born v. Home Ins. Co.*, 110 Iowa 379, 81 N. W. 676, 80 Am. St. 300, where a policy on property provided a forfeiture for mortgaging it without the company's consent, and assured did mortgage a portion of the property, but before loss paid the incumbrance, it was held that such payment operated to restore the property to the protection of the policy, and hence plaintiff was entitled to recover for the loss thereof.

"The theory," said the court, "upon which an existing mortgage is held to be a violation of a clause in the policy against an increase of risk is that it does increase the risk."

But, according to the opinion of the court, there was no increase of the risk after the mortgage had been paid off. So the theory upon which the insurance company in this case stipulated for the installment of the sprinkler system was that such installment would decrease the risk. And it did increase the risk during the time it was not in working order, but the same reasoning would apply as in the mortgage case in holding that, after its installment, the increase of risk would be at an end. In *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013, the policy contained the following provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for 10 days."

The house covered by the policy became vacant and unoccupied and so remained for thirty days, when it was reoccupied. The house was destroyed after reoccupancy. Held, that the policy did not become absolutely void by reason of the house having become vacant and remaining so for thirty days, but the insurance was merely suspended during the period of violation, and revived upon the reoccupancy of the house and became again of binding force and effect. In *Insurance Co. of North America v. Pitts*, 88 Miss. 587, 41 South. 5, 117 Am. St. 756, 7 L. R. A. (N. S.) 627, under a provision of a fire policy that it should be void if the building be or become vacant or unoccupied and so remain for ten days, where the building was unoccupied for more than ten days, but a fire occurred afterwards during its occupancy, it was held that the policy did not become void. In *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740, where an insured incumbered his personal property by a

chattel mortgage, after such property had been insured and contrary to the provisions of the insurance policy, he was allowed to recover the value of the insured property destroyed, by showing that, at the time of its destruction, it was free from the lien of the mortgage; citing *State Ins. Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 20 Am. St. 696, 6 L. R. A. 524. In *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445, it was held that the temporary illegal use without a license of property insured, if uncontemplated at the time of taking the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time it was to run. It would simply vitiate the policy during the time of the illegal use and, when the illegal use stopped, the policy would revive; the court saying:

"It is not the necessary meaning of the word 'void,' as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being";

citing Phillips on Insurance, § 975, where it is said:

"After it [*i. e.*, the policy] has begun, so that the premium is become due, it surely is but equitable that a temporary noncompliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it";

citing many cases to sustain the rule.

It is useless to cite a greater number of cases. But we are satisfied, from an examination of all the cases cited by both appellant and respondents, and of all that we have examined on our own motion, that the statement of Elliott on Insurance above quoted, to the effect that the weight of authority seems to support the view that a violation of a condition that works a forfeiture of the policy, merely suspends

the insurance during the violation, is a correct announcement. In *Traders Ins. Co. v. Catlin, supra*, the court, to show the fallacy of the rule contended for, says:

"That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself as a reasonable rule."

To still further show the fallacy, by distorting the proposition, yet still leaving it within the bounds of possibility or even probability, under the rule contended for, if the holder of a life insurance policy in the state of Washington, which prohibits by its terms the departure of the applicant from the territory of the United States, should inadvertently or otherwise straggle across the boundary line into British Columbia and, after detecting the mistake which he had made geographically, should return to the state of Washington, live here for twenty, thirty, or forty years, paying his annual premiums which are accepted and appropriated by the company, upon his death, occurring by an accidental discharge of a fire-arm or by being cremated in a burning theater—causes which could not possibly have been affected by the breach of his contract—his beneficiary would be deprived of the benefit of his life insurance policy by reason of such violation. The thought is too abhorrent to be maintained for a moment, and yet in principle it is exactly the same.

But, in addition to all these questions which we have discussed, we think probably there is no case which would hold that the appellant in this case could successfully urge this defense, for, according to the findings of the court, there has been no violation of any contract whatever by the respondents. Conceding that there was a warranty, there was no warranty that the assured should at all times maintain the automatic sprinkler system, but the representation was only that the assured should "use due diligence" in maintaining the sprinkler system; and, as we have seen, under the

findings of the court, due diligence was used in that regard. So that it seems absolutely at variance with any theory of the law to prohibit the insured from recovering under this policy.

The judgment of the lower court will therefore be affirmed.

CROW, PARKER, FULLERTON, and MOUNT, JJ., concur.

MORRIS, J. (dissenting)—I dissent for the reasons given in the opinion on the original hearing in Department One, to which I still adhere. The majority opinion as herein expressed wipes out the law of warranty in this state, a principle that is as old and well founded as any other principle in insurance law. There is no conflict between the *Hart* case referred to in the majority opinion and the rule announced in the opinion on the original hearing herein. The *Hart* case deals with a representation which the court refuses to extend into a warranty either by interpretation or implication, and holds that, in order to be read as a warranty, the provision must appear to be expressly so intended by the insured and insurer, and in case of ambiguity or doubt, the construction should be that of a representation rather than a warranty. The same rules are announced and adhered to in the original opinion, and there was no expressed or implied intention to depart from them. It is said in the *Hart* case that, notwithstanding the policy contains hard and unjust conditions, the insurance company has the right to make such a contract, and when so made, it is the duty of the courts to enforce them regardless of their harshness, when it appears such a contract was actually made. The original opinion goes no further. Finding an express warranty in the policy based upon a reduction of the premium, it gave effect to it, and in so doing followed the law both in principle and upon authority.

[No. 8982. *En Banc.* August 6, 1910.]

In the Matter of the Application of S. R. RAINEY *for a Writ of Habeas Corpus.*[1]

BAIL — EXCESSIVE BAIL — CRIMINAL CHARGE — ASSAULT. Bail in the sum of $5,000 on a charge of assault in the second degree is not excessive, where the assault was atrocious and without provocation and the maximum penalty is imprisonment for ten years in the penitentiary or a fine of $1,000, or both (RUDKIN, C. J., dissenting).

Application filed in the supreme court August 5, 1910, for a writ of habeas corpus. Denied.

Frank H. Kelly, for petitioner, cited: *In re Rafferty*, 1 Wash. 382, 25 Pac. 465; *Packenham v. Reed*, 37 Wash. 258, 79 Pac. 786; *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 Pac. 990; *United States v. Lawrence*, Fed. Case, No. 15,577; *United States v. Brawner*, 7 Fed. 86; *Ex parte Croom & May*, 19 Ala. 561; *Ex parte Choynski*, 42 Tex. Cr. 586, 61 S. W. 391; *Ex parte Douglas*, 25 Nev. 425, 62 Pac. 49; *Petition of Alexander*, 59 Mo. 598, 21 Am. Rep. 393, 394; 5 Am. Dig. (Century ed.), column 2317, par. 211; 3 Am. Dig. (Decennial ed.), par. 52 and 53, Bail; Rem. & Bal. Code, §§ 1076, 1077.

F. G. Remann, for respondent.

PER CURIAM.—This is a proceeding by habeas corpus. It appears that the petitioner is charged with the crime of assault in the second degree. His bail bond was fixed in the sum of $5,000, which he alleges is an excessive and unreasonable amount, and that he is unable to give the same. The assault appears to have been made without provocation and was an atrocious one, and the person assaulted was and is severely injured. The maximum penalty for this offense is imprisonment in the penitentiary for a period of not more

[1]Reported in 110 Pac. 7.

than ten years or by a fine of not more than $1,000, or by both. Rem. & Bal. Code, § 2414. In view of this punishment and of the atrocity of the offense, of which the court fixing the amount of the bail appears to have been advised, we are of the opinion that the bail is not so unreasonable or excessive in amount as to warrant a reduction.

The writ is therefore denied.

RUDKIN, C. J. (dissenting)—The amount of bail to be exacted depends upon the circumstances of each case and necessarily rests to a large extent in the discretion of the court or committing magistrate, but I am nevertheless of opinion that bail in the sum of five thousand dollars for a laboring man accused of a common felony, where he has no means except his daily wages, is grossly excessive and should be materially reduced. I therefore dissent.

[No. 8609. *En Banc.* May 3, 1910.]

W. HAMMOND WRIGHT *et al.*, *Appellants*, v. HENDRICK SUYDAM *et al.*, *Respondents*.[1]

SPECIFIC PERFORMANCE—TITLE OF DEFENDANT—EVIDENCE—SUFFICIENCY. Specific performance of a contract to convey a ten-acre tract, sold to plaintiffs by the defendant, cannot be decreed where defendant had no title thereto; holding simply an option on forty acres of which the ten-acre tract was a part, which option was not paid up; the price realized from the sale to the plaintiff being insufficient to pay up defendant's option and obtain title to the land, and defendant's vendor being unwilling to convey to defendant until the whole forty acres was paid for.

SAME—ALTERNATIVE RELIEF—DAMAGES. Damages for breach of contract to convey land cannot be awarded in an action brought for specific performance, where, to the knowledge of the plaintiff, the facts did not at any time warrant a decree for specific performance.

SPECIFIC PERFORMANCE—DISSMISSAL OF SUIT—FORM OF DECREE. Upon denying specific performance of a contract to convey land be-

[1]Reported in 108 Pac. 610; 110 Pac. 8.

cause of want of title in the vendor, dismissal of the action should be without prejudice, especially where the vendor's title may be perfected or the vendee may be entitled to other relief under the contract.

Appeal from a judgment of the superior court for King county, Canfield, J., entered June 28, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Wright & Kelleher and *Wm. Hickman Moore*, for appellants.

Roberts, Battle, Hulbert & Tennant (*C. J. France*, of counsel), for respondents.

PARKER, J.—This is an action to enforce specific performance of a contract for the sale of land. A trial resulted in judgment denying the relief prayed for by plaintiffs, and they have appealed to this court. The facts are much involved, and some of them are seriously in dispute. However, we think certain of the facts shown by the record, beyond controversy, will enable us to determine the rights of the parties. These, so far as necessary for us to notice, are as follows:

On August 14, 1908, the respondent Hendrick Suydam executed and delivered to appellant W. Hammond Wright the following contract for the sale of ten acres of land in King county:

"100.00

"Received of W. Hammond Wright the sum of one hundred dollars as part payment upon purchase price of the following described real estate. [Here follows description.] The balance of the purchase price of the said premises is Seventy-nine hundred dollars to be paid in cash, upon delivery of deed.

"The undersigned owners of said premises agree within fifty days to deliver to the purchaser an abstract of title prepared and certified by a reputable and approved abstract company, showing title to said property in said owners in fee

simple free from all liens and encumbrances as herein stated, and good and marketable, and to convey such title to the purchaser, his heirs or assigns, by warranty deed prepared by the purchaser with full covenants satisfactory to the purchaser.

"If upon investigation title to said premises shall be found to be insufficient in any of the respects aforesaid, either in fact or as shown in the abstract, or shall be unsatisfactory to the attorney for the purchaser, the purchaser may at any time thereafter at his option elect to have the sums of money theretofore paid by him as part payment of the purchase price, immediately repaid to him, and in the event of such election the owners shall return such sums and all further obligation upon their part shall then cease: provided, however, that such election cannot be exercised until after thirty days after the objections to title are pointed out in writing to the owners, which length of time is allowed to them to remedy the same.

"If title to the said described premises shall not be subject to objection in any of the respects aforesaid, and shall be satisfactory to the attorney for the purchaser and the purchaser shall fail upon his part to perform any of the terms of this agreement; then the said sum of money first above mentioned, shall be retained by the undersigned owners as liquidated damages, and they shall also be entitled to a return to them of the said abstract, and neither party shall be under any further liability.

"Deed is to be executed immediately upon examination of abstract, or within time allowed to owners to cure objections.

"Purchaser is to have twenty days after delivery of abstract within which to examine title.

"Time is of the essence of each of the provisions of this agreement.

"Dated at Seattle, Washington, this August 14, 1908.

"HENDRICK SUYDAM, Owner."

Since July 14, 1908, the respondent Stevenson Sanders Land Company has been the owner of a certain tract of land containing forty acres, ten acres of which tract is the same land mentioned in the contract above set forth. The only interest the respondent Suydam has ever had in this

ten acres was under an option he held to purchase the whole forty acres, executed by the respondent land company on July 14, 1908, and under a contract to purchase the same, entered into by the land company with him on August 15, 1908. By the terms of this contract Suydam was to pay the land company, as the purchase price for the entire forty acres, the sum of $24,000; $6,000 of which he paid in cash, and the balance to be paid $6,000 on or before July 1, 1909, $4,000 on or before July 1, 1911; $4,000 on or before July 1,1912, and $4,000 on or before July 1, 1913. At the time of rendering the final judgment in this case, no part of the purchase price had been paid upon this contract, other than the $6,000 paid at the time of its execution, so that $18,000 remained unpaid thereon. Suydam is not entitled to a conveyance under this contract until the payment of the whole of the purchase price with 7 per cent interest per annum on deferred payments. Time is made the essence of this contract, and a failure to make payments as therein agreed would result in a forfeiture of all of Suydam's rights thereunder.

In their complaint the appellants refer to both the option and contract under which Suydam acquired his right to purchase the forty acres, referring to the record of the option and contract in the auditor's office of King county by volumes, pages, and dates, and allege that, "The defendant Suydam has no right, title or interest, in said property other than such as is derived through the said written agreement." We mention this to show appellants' knowledge, prior to their commencement of this action, of the nature and extent of Suydam's interest in the land. The appellants, knowing that Suydam did not own the land in fee and that he for that reason could not convey good title, have never offered unconditionally to pay him the balance of the purchase price upon the contract for the ten acres and signified their willingness to take from him a conveyance of such title as he possessed. The nature and extent of their

offer is best shown by the allegation in their complaint as follows:

"The plaintiffs now are, and at all times herein mentioned have been ready, willing and anxious, provided good title is shown by proper abstract, to proceed with the purchase of said property under the terms of said option shown in the said Exhibit "A," and now are and at all times have been ready to pay in full the balance of the purchase price of the said property."

The Exhibit "A" mentioned, is the contract for the ten acres above set forth. The respondent land company by its answer admits the execution by it of the contract of August 15, 1908, by which it agreed to sell the forty acres to Suydam, and alleges affirmatively that Suydam has paid $6,000 on the purchase price and no more; and further alleges,

"That this defendant does not know and cannot pass upon with safety to itself the difference between the said plaintiffs and the said defendant Hendrick Suydam, but has been at all times ready and willing and is now ready and willing to convey the said lands and premises under the terms of said option to the person or persons entitled to such conveyance upon the performance of the terms and conditions of said option by said person or persons and hereby tenders performance of said option to such person or persons as the court may adjudge entitled to a conveyance herein."

The word "option" in this allegation clearly means the contract to sell Suydam the forty acres, of August 15, 1908. The land company prays that it be not subjected to costs and that its rights be fully protected. The affirmative matter in this answer is not replied to, so it stands as admitted.

Learned counsel for appellants, as we understand them, contend that, in view of the attitude of the respondent land company, and its willingness to convey to Suydam or whomsoever the court may determine is entitled to succeed to his interest, the appellants have the right to have such a decree entered in their favor as to cause the balance of the $7,900, due upon their contract with Suydam for the ten acres, to be

applied in payment of Suydam's obligation necessary to perfect his title to the ten acres, and that they then have conveyance of the ten acres, either from the land company through Suydam or from the land company direct. This contention is based upon what we regard as an erroneous assumption as to the nature and extent of the offer made by the land company. The land company does not offer to convey the ten acres upon the payment to it of any certain sum due from appellant to Suydam, but offers to convey under the terms of its contract with Suydam. This offer can mean nothing less than an offer by the land company to convey when it has been fully paid the balance of the purchase price upon the whole forty acres. If the contract between the land company and Suydam was for the sale of the ten acres only, which Suydam agreed to convey to appellants, and the balance due from appellants to Suydam was sufficient to pay the balance due the land company from Suydam, and thus perfect Suydam's right to specific performance as against the land company, then the specific performance which is here prayed for might be possible in the manner sought to bring it about. The trouble with enforcing specific performance is that the land company cannot be required to convey upon any different terms than that expressed in its contract of August 15, 1908, wherein it agrees to convey to Suydam the forty acres upon payment of $24,000. Upon no other conditions can the land company be required to convey, either to Suydam or to any one who may succeed to his interest.

It is clear that if the whole of the balance of $7,900, due to Suydam upon his contract for the sale of the ten acres to appellants, were applied towards the payment of the $18,000 due from him to the land company, still neither he, nor any one claiming under him, would be entitled to a conveyance from the land company. The condition upon which the land company is required to convey would still fall far short of performance. There is nothing in this record showing that the land company has ever offered or is required to convey this

ten acres, except by a conveyance of the whole forty acres upon payment to it of the balance of the purchase price named in its contract for the sale thereof. Suydam did not, at any time prior to the rendering of judgment in this case, have title to the land involved so that he could convey the same, nor was his interest in the land of such nature that the court could by its decree place appellants in such position as his successor in interest that they would be entitled to a conveyance from the land company of the ten acres, even by payment to it of the whole of the balance of $7,900 due from appellants to Suydam. The court has no means of compelling Suydam to perfect his title, except possibly by directing the application of the balance due him from appellants, if that would accomplish such result; and since that sum is clearly insufficient to satisfy the conditions upon which the land company can be compelled to convey, we are of the opinion that the court can not decree specific performance by directing the land company to convey; and a decree requiring Suydam to convey would be an idle and fruitless thing. It is elementary that "the contract must be such that the court is able to make an efficient decree for its specific performance, and is able to enforce its own decree when made." 4 Pomeroy, Equity Jurisprudence (3d. ed.), § 1405; 2 Warvelle, Vendors (2d. ed.), § 752; Maupin, Marketable Title to Real Estate, 480; *Snell v. Mitchell*, 65 Me. 48; *Ormsby v. Graham*, 123 Iowa 202, 98 N. W. 724; *Pack v. Gaither*, 73 N. C. 95; *Chartier v. Marshall*, 51 N. H. 400.

The facts not warranting a decree for specific performance at the time of commencement of the action or any time thereafter, and being known to appellants, the question of their damage is not in this case. *Peters v. Van Horn*, 37 Wash. 550, 79 Pac. 1110; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

Other contentions made by counsel relate to disputed facts touching the alleged forfeiture of appellants' rights under their contract with Suydam. These need not be noticed,

since they in no event would change the result. We conclude that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., CROW, MOUNT, CHADWICK, DUNBAR, FULLERTON, and GOSE, JJ., concur.

ON REHEARING.

[Decided August 6, 1910.]

PARKER, J.—Appellants have petitioned for a rehearing of this cause which we have granted, for the purpose of determining whether or not the judgment of the learned trial court should be modified and limited in its effect so as to leave open for adjudication upon the merits the question of appellants' right to specific performance of the contract sued upon, in the event appellants desire to bring a new action for that purpose. By our former opinion, it was held, in effect, that appellants should have been denied a decree of specific performance, because, at all times prior to the rendering of the judgment denying such relief, it was not possible for the court to render or enforce an efficient decree of specific performance whatever the rights of the parties might be, by reason of the want of title in respondent Suydam such as would enable him to convey in obedience to any such decree. We were not called upon to express any opinion upon the merits of appellants' rights as against respondents, that question not being involved when it was once determined that in no event could specific performance be enforced as the title stood at the time of, and prior to, rendering the judgment appealed from.

If the judgment of the learned trial court had gone no farther than to merely deny specific performance and dismiss the case, without assuming to finally adjudicate the rights of the parties under the contract sued upon, we would be content to let our former opinion affirming the judgment rest without modification. But we are reminded that, inadvertently, the full force and effect of the judgment was overlooked in the former review of the case. The judgment by its terms

not only denies specific performance, but also, in effect, decrees that appellants are not entitled to any relief upon the contract, that it be cancelled of record, and that the property thereby agreed to be conveyed be "discharged and cleared from any and all cloud or incumbrance which may exist thereon by virtue of the executing of said instrument by said defendant Suydam." By reference to the former opinion, it will be seen that respondent Suydam's title to the land which he agreed to sell appellants may have become perfected after the rendering of the judgment of the trial court, or may even in the future become so perfected, since the contract by which he was to acquire the land apparently may be kept alive by him until 1913. And it is also possible that appellants may have a right of specific performance when Suydam's title becomes such as to enable a court to render and enforce an efficient decree to that end. We express no opinion upon these questions; but in view of the ground upon which a decree of specific performance must have been denied at the time of rendering the judgment appealed from, we are of the opinion that the judgment should be vacated, and in lieu thereof a judgment of dismissal entered without prejudice to a new action.

It is urged by learned counsel for appellants that we should remand the case for further evidence or for a new trial. This we think would not be a proper practice. This case came to an end when the trial court disposed of it, and we are now only to determine what final judgment should then have been entered. *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. 56, 15 L. R. A. 784.

The trial court is directed to vacate its judgment, and in lieu thereof enter a judgment dismissing the action without prejudice to the rights of the appellants to commence a new action. In view of this disposition of the case, we conclude that each party should pay their own costs in this court.

It is so ordered.

RUDKIN, C. J., GOSE, FULLERTON, CHADWICK, MOUNT, CROW, and MORRIS, JJ., concur.

[No. 8680. Department One. August 6, 1910.]

In the Matter of the Guardianship of NELS OSCAR SALL.[1]

INSANE PERSONS—GUARDIANS—APPOINTMENT. A guardian may be appointed of the estate of one who, following an accident, suffered a nervous shock and ill health, seemed to have forgotten his own identity, and displayed marked symptoms of mental alienation and suddenly disappeared, since which nothing had been heard of him after diligent search for over a year (RUDKIN, C. J., dissenting).

SAME—JURISDICTION TO APPOINT GUARDIAN—STATUTES—CONSTRUCTION—COURTS—INHERENT POWERS. Construing as a whole the act of 1909 (Rem. & Bal. Code, § 1622 *et seq.*), providing in the first section that the superior court may appoint a guardian of the local estate of an insane person resident in the county, and in section 4, that if the insane person resides out of the state of Washington, service may be had by publication, the court is given jurisdiction to appoint a guardian of the local estate of a nonresident insane person; especially in view of the inherent chancery powers of the court to protect the estates of nonresident incompetent persons, the statute being merely cumulative and concurrent.

SAME. Const., art. 4, § 6, conferring universal original jurisdiction upon the superior court in all special cases and proceedings not otherwise provided for, is sufficiently broad to embrace general chancery jurisdiction to appoint guardians of the local estate of nonresident insane persons.

SAME—JURISDICTION TO APPOINT GUARDIAN—DOMICILE. The jurisdiction of the superior court to appoint a guardian of the local estate of an insane person does not depend upon his domicile, but the appointment may be made when his whereabouts is unknown.

SAME—APPOINTMENT OF NONRESIDENT. Under Rem. & Bal. Code, § 1622, providing no residential qualifications, the superior court may appoint a nonresident guardian of the local estate of a nonresident insane person.

INSANE PERSONS—GUARDIANS—JURISDICTION OF PROPERTY. Jurisdiction to appoint a guardian for the estate of a nonresident insane person is limited to property within this state.

Appeal from an order of the superior court for King county, Main, J., entered August 19, 1909, appointing a guardian for the estate of a nonresident incompetent person, after a hearing before the court. Affirmed.

[1]Reported in 110 Pac. 32; 626.

James J. McCafferty, for appellant.

Samuel Morrison and *Charles Loring*, for respondent.

CHADWICK, J.—Charles G. Sall, a resident of the state of Minnesota, filed his petition under chapter 118 of the Laws of 1909, page 408 (Rem. & Bal. Code, § 1622 *et seq.*), praying that he be appointed guardian of the estate of his brother, Nels Oscar Sall, whom he alleged to be an incompetent person. At the time of the application, Nels Oscar Sall was of the age of forty-five years. For several years he had been a resident of the territory of Alaska, where he with two others discovered a group of mining claims in the year 1907. In December of that year the claims were bonded to James J. Godfrey, who resists the petition for guardianship. By the terms of the option agreement, a certain sum was paid down and a deed was executed and placed in escrow at the Puget Sound National Bank, which bank was made the agent of all parties to the escrow agreement, with power to receive the deferred payments, and upon final payment to surrender the deed. In November, 1909, when these proceedings were commenced, there was $1,985 of the moneys coming to Nels Oscar Sall and paid under the option on deposit in the Puget Sound National Bank and subject to his check.

Prior to April, 1908, Nels Oscar Sall had been a man of usual mental strength, but in that month, while with a sled and team upon the Chitna river in Alaska, the ice broke, precipitating the team and sled and Mr. Sall into the waters of the river. He floated under the ice for a distance of about seventy feet, when he was rescued by his companions. He suffered an immediate shock to his nervous system. Thereafter he was in ill health, and it was noticed that his conduct and demeanor toward others was not as it had formerly been. He was taken to the hospital at Valdez, from whence, after some weeks' treatment, he suddenly disappeared, and was afterwards found by the United States marshal's office acting through the intervention of Senator Nelson of Minne-

sota. When found he was working in a railroad camp at Cordova. He seemed to have forgotten his name; at any rate he was working under an assumed name, and there is evidence tending to show that he at times lost the faculty of remembering his own identity. At the railroad camp he is said to have displayed almost superhuman strength, a condition not unusual in those of failing mentality, and in some cases a marked symptom of mental alienation. Thereafter he came to Seattle, where several of his former friends met and conversed with him. While they were not willing to say that he is not capable of attending to his own business, they all agree that they would not trust him to attend to business of any kind for them. The opinion is expressed that he was "batty," or "off his nut," and it is shown that, contrary to his former disposition, he was silent, melancholy, and morose; that when spoken to he would answer questions sullenly, almost insolently. There is evidence to show that he was afraid of losing his money and dying poor, and that the banks were unsafe; and while at the hotel, the clerk says that "he would walk around; walk to his room six or seven times in ten minutes." In November, 1908, he disappeared from the Diller hotel, and has not since been seen or heard of, although search has been made in Alaska, Seattle, Tacoma, Portland, and other places. These are the facts which moved the court to appoint Charles E. Sall guardian of the estate of his brother, and are sufficient, in the judgment of this court, if the law does not intervene to prevent it.

Mr. Godfrey has appealed, assigning as error that the superior court had no jurisdiction to appoint a guardian for a nonresident, or one not within the jurisdiction of the court. It will be observed that chapter 118, Laws of 1909, page 408 (Rem. & Bal. Code, § 1622 *et seq.*), refers only to property, and has nothing whatever to do with the guardianship of the persons of the classes referred to therein. It provides in § 1 that a petition shall be filed showing, not only that the incompetent person has property needing care and attention,

but that the owner is a resident of the county where the petition is filed. Section 4 of the act provides that, where the incompetent person resides out of the state of Washington and has property within said state requiring the care of a guardian, and a petition is filed in the county where such incompetent has property, service by publication may be had.

It is contended that § 1 defines the jurisdiction of the court, and that § 4 cannot be given effect unless it is also made to appear that the incompetent is, in fact, domiciled in the county. If this effect is given to the statute, we think, unquestionably, that the contentions of the appellant should prevail. But, construing the act as a whole, and recognizing the necessity as well as the duty of the state to protect the estates of incompetent persons, the construction put upon the statute by appellant may well be doubted. A careful examination of the law on our own account convinces us that the superior courts have an inherent jurisdiction to protect estates of nonresident, incompetent persons; and that, while it is generally said that the power to appoint guardians is purely statutory, the power in fact lies in the sovereignty of the state, and the procedure only is statutory. In England, from whence we have derived our common law and the accepted heads of equity jurisdiction, the king assumed the care of insane persons and their property *in parens patriae*. After a declaration or finding of insanity, the jurisdiction in lunacy cases was held in some early cases to be no longer exercisable under the king's sign manual, but in virtue of the general powers of the court. *Ex parte Grimstone*, 2 Amb. 706; *Burford v. Lenthall*, 2 Atk. 551; *In re Fitzgerald*, 1 Ll. & G. *t.* P. 20, 2 Sch. & Lef. 439.

Mr. Woerner, in his work on the American Law of Guardianship, § 18, says that it is the prevalent conviction of lawyers, judges, and text-writers in America that, in the absence of countervailing statutes, American courts having equity powers possess a general jurisdiction for the appointment of guardians. Story draws no distinction between the powers of

American and English courts in this respect; Story's Eq. Jur., ch. 35; and Mr. Pomeroy, in his Equity Jurisprudence, at § 1306, says that American courts have this power in so far as it has not been taken away by statute. It is, therefore, held that, where the power to appoint guardians has been conferred upon other courts, as, for instance, the probate court of the territory before the creation of the state of Washington, the power is cumulative and concurrent with the court of chancery. *Lee v. Lee*, 55 Ala. 590; *Wilson v. Roach*, 4 Cal. 362; *Ex parte Miller*, 109 Cal. 643, 42 Pac. 428; *Board of Children's Guardians v. Shutter*, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; *Corrie's Case*, 2 Bland. (Md. Ch.) 488; *Wilcox v. Wilcox*, 14 N. Y. 575; *Durrett v. Davis*, 24 Gratt. (Va.) 302; *Glasscott v. Warner*, 20 Wis. *654; *Harlin v. Stevenson*, 30 Iowa 371; *Sterritt v. Robinson*, 17 Iowa 61.

It would follow, then, that the statute, in declaring that the court might appoint a guardian for the property of an incompetent person resident of the county, would not bar a court of general jurisdiction of its general equity powers, provided the constitution is broad enough to warrant its exercise. That the superior court of this state has such general jurisdiction has been frequently declared. In *Moore v. Perrott*, 2 Wash. 1, 25 Pac. 906, it is said:

"The language of the constitution [art. 4, § 6,] is not that the superior courts shall have exclusive jurisdiction, but it gives to the superior courts universal original jurisdiction, leaving the legislature to carve out from that jurisdiction the jurisdiction of the justices of the peace, and any other inferior courts that may be created."

In *Krieschel v. Board of Comr's., Snohomish County*, 12 Wash. 428, 41 Pac. 186, it was said of the same provision:

"The language there used is certainly very broad and comprehensive, and might well be said to apply to cases of this character, as they are 'not otherwise provided for,' and, if contemplated at all, fall within the purview of this provision. At all events, it is manifest that it was not the intention of the

framers of this § 6 to exclude any sort or manner of causes from the jurisdiction of the superior court."

In *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107, it is said:

"In this state we have no probate court, properly speaking, as distinguished from the court that entertains jurisdiction of other matters. The court of general jurisdiction also hears and determines probate matters. Matters pertaining to probate are referred to what is called 'probate procedure,' as distinguished from what is denominated 'civil' or 'criminal procedure.' But when the court, sitting in a probate proceeding, discovers in a petition the statement of facts which forms the basis of a controversy, we see no reason why it may not settle the issues thereunder when an appearance has been made thereto, and then proceed to try it in a proper manner, as any other civil cause."

In *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502, the latest and perhaps the strongest expression of the court is as follows:

"The constitution does not make the superior courts probate courts. On the contrary it vests the superior courts with jurisdiction 'of all matters of probate'; hence the court is not shorn of its general powers simply because the cause before it may be one which was cognizable formerly in a court of probate. It possesses in every case and at all times its powers as a court of superior and general jurisdiction, and among these is the power to hear and determine the question to whom a bequest made by a decedent rightfully belongs. A statute, therefore, can neither add to nor take away the power, and it is immaterial to inquire whether or not one conferring such a power is in existence."

Hence, the superior courts have this jurisdiction irrespective of any statute, and may exercise it as a matter of obvious necessity, by the application of equitable principles. This is well established.

In *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111, the power of the court to exercise jurisdiction over the estates of incompetent persons was called in question. It was contended

"That upon the organization of our state government the state, as a political sovereignty, in its character of *parens*

patriae, succeeded to all the rights and duties previously enjoyed or exercised by the Crown of England with respect to idiots and lunatics and their estates. That the power to which the state thus succeeded is not of a judicial character, wherefore, in the distribution of the powers of government under the constitution, it was not thereby delegated to or conferred upon the judicial department of government, and hence, without express legislation, a court of chancery was not authorized to exercise it."

After an exhaustive discussion of the relative rights and limitations of the legislative and judicial branches of the government, the court came to the conclusion that the courts could, in the exercise of their general chancery jurisdiction, order a sale of real property of an incompetent under either one of the following equitable principles:

"(1) The duty of the state to protect and provide for such of its citizens as are incapable of taking care of themselves. (2) The right of every owner of property to have it applied to his support. (3) The absolute necessity for such relief. (4) Such applications involve the exercise of judicial power. (5) The duty which the state owes to those laboring under disabilities can be more appropriately and efficiently performed through courts of equity than in any other way."

All of which the learned writer of the opinion proceeds to discuss, saying in conclusion:

"All who are conversant with the history of equity jurisprudence know that as a distinct system, it has been of constant growth and development from its inception to the present time, covering a period of hundreds of years. The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people."

Without committing ourselves to the doctrine there announced, that a court might sell the property of an incompetent person for any purpose other than to relieve his immediate necessities and contribute to his comfortable support, the reasoning is conclusive upon the question of jurisdiction, and is sustained by the following authorities: *Allman v. Taylor*, 101 Ill. 185; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Corrie's Case*, 2 Bland (Md. Ch.) 488; *Latham v. Wiswall*, 37 N. C. 294; *Dowell v. Jacks*, 58 N. C. 417; *Ashley v. Holman*, 15 S. C. 97; *Burke v. Wheaton*, Fed. Case, No. 2,164.

While there are cases holding that this special jurisdiction over the estates of incompetent persons does not come to us as inherent to the equitable jurisdiction of our courts, reference to our constitution, art. 4, § 6, as construed by the cases heretofore decided by this court, will show that jurisdiction is given "in all special cases and proceedings as are not otherwise provided for." This must include power over the estate of an incompetent when properly brought before the court, for the object of the people in establishing their courts and defining their jurisdictions was to safeguard and protect property rights. It is only where there is no general or plenary jurisdiction conferred upon the court by statute or constitution that the jurisdiction of the courts exercising power over the persons or estates of incompetents is to be considered limited or special. *Modawell v. Holmes*, 40 Ala. 391. To put the property of an incompetent to such uses as will tend to his relief and comfort should be one of the first duties of the court, or as is desired in this case, to use the funds on hand for the protection of his property and to finding the ward if possible. Under the general provisions of our constitution distinctions are preserved between the common law, equity, and probate practice, but it is for convenience, rather than because of the original reasons underlying the segregation of such courts under the English procedure. The power, then, being in the superior court, covering as it

does the functions of the common law courts, courts of equity and probate, the name of the particular jurisdiction is immaterial to our discussion so long as a procedure is provided to carry it into execution. This the legislature has undertaken to do in § 4 of the act of 1909, page 409 (Rem. & Bal. Code, § 1625).

Nor do we think that the jurisdiction depends upon the domicile of the incompetent. If it did, the humane purposes of the law might be defeated entirely. The first case in which this phase of the law is noticed is that of *Ex parte Southcote*, Amb. 110. Southcote was confined in an asylum in Belgium. He had property in England. Upon a petition to appoint a commission for his estate, which of course involved an inquiry *de lunatico*, Lord Hardwicke, who delivered the opinion, expressed some doubt as to the practice, but was convinced that he had power to issue a commission where the lunatic was a nonresident and had property within the jurisdiction of the court. In *In re Devausney*, 52 N. J. Eq. 502, 28 Atl. 459, a guardian was appointed for a nonresident ward. It was held that the court was not ousted of its jurisdiction to issue a commission because of the nonresidence of the incompetent. In this case it was held that the *Southcote* case "is an authority for issuing a commission when the alleged lunatic is nonresident, if he or she owns an estate within the jurisdiction." The court in the opinion mentioned reviews the English cases as well as the following American cases: *In re Perkins*, 2 Johns. Ch. 124; *Matter of Petit*, 2 Paige 174; *Matter of Ganse*, 9 Paige 416; *Matter of Fowler*, 2 Barb. Ch. 305. The only case we have found where the whereabouts of the incompetent was not known at the time of the petition was that of Ganse. Ganse had been a resident of the town of Fishkill, N. Y., and had considerable property at that place. He had become deranged and thereafter disappeared. His whereabouts was unknown to his friends at the time the application was made for guardianship. Upon the authority of the *Southcote* case, the commis-

sion issued, and the court took jurisdiction of his property.

It is next insisted that the court, in any event, had no power to appoint a nonresident as a guardian. It will be remembered that the statute, chapter 118, Laws of 1909, page 408 (Rem. & Bal. Code, § 1622 *et seq.*), provides for a guardian for the estate only. No reference is made to residential qualifications. The general rule, as we understand it to be, is that, in the absence of a statute, the court may appoint any fit and proper person if he be a resident or nonresident. His bond answers for his presence and, in theory at least, he is always before the court. While a court should not, and probably would not, have the power to appoint a nonresident guardian of the person of a resident incompetent, the manifest objections to such a procedure can have no application where it is the thing and not the person which is the subject of the court's intervention. Although in the absence of a statute a nonresident guardian for the person as well as the estate was sustained in *Berry v. Johnson*, 53 Me. 401, this authority may well be doubted in so far as it covers the person of the incompetent.

Other errors are assigned, but it seems to us that they all depend upon the power of the court to appoint a guardian for a nonresident ward, and not upon further construction of the statute, and, like respondent's objection to the capacity of the protestant to appear in this and the lower court, need no discussion.

GOSE and MORRIS, JJ., concur.

FULLERTON, J. (concurring)—In my opinion the statute affords ample authority for the action of the court, and I concur in the conclusions reached by the majority. On the question of the inherent power of the court to appoint a guardian under the circumstances recited, I express no opinion.

RUDKIN, C. J. (dissenting)—I agree with the majority that our superior courts have jurisdiction to appoint guard-

ians for nonresident insane persons who have property in this state, but do not think that such jurisdiction should be exercised under the facts disclosed by this record. The person for whom a guardian has been appointed mysteriously disappeared more than a year and a half ago, and diligent search and inquiry throughout the entire Pacific Coast has failed to discover either him or his whereabouts. Under such circumstances, when we consider the state of his mind and the state of his health, the presumption of death is far stronger than the presumption of continued insanity. If dead, the order appointing the guardian is a nullity (*Scott v. McNeal*, 154 U. S. 34), and will afford no protection to third persons dealing with the alleged guardian. The court below has commissioned a nonresident of this state to demand and receive money from citizens of this state, when payment to the person thus commissioned will, in all human probability, constitute no acquittance of the debt. For this reason I dissent.

ON PETITION FOR REHEARING.

[*En Banc.* September 7, 1910.]

PER CURIAM.—A petition for a rehearing has been filed in this cause, in which the appellant earnestly insists that the court below was without jurisdiction to appoint a guardian for the estate of a nonresident insane person. We adhere to the views expressed in our former opinion upon that question. But it might be inferred from the argument set forth in the petition that the guardian assumes that he has been appointed for all the estate of the insane person, wheresoever situated. This position is untenable. The jurisdiction of the courts of this state is limited to the property within its borders and, properly construed, the order appointing the guardian is likewise limited in its application.

The rehearing is denied.

[No. 8526. Department Two. August 8, 1910.]

EUREKA MINING, SMELTING & POWER COMPANY, *Respondent*, v. M. A. LIVELY, *Appellant*.[1]

CORPORATIONS—FRAUD—TREASURY STOCK—MISAPPLICATION OF PROCEEDS—LIABILITY OF STOCKHOLDERS. Where the promoters of a mining corporation conveyed the mines and property to the corporation in consideration of the stock, subscribed for and issued to themselves, application of the proceeds of treasury stock to repay advances for the purchase price of the mines and the cost of securing patents is a fraud upon the corporation and the purchasers of treasury stock, the proceeds of which should have been used for development; and judgment against such promoters is properly entered for the sums so diverted.

CORPORATIONS—STOCK—TRANSFERS—INNOCENT PURCHASER—LIEN OF COMPANY. A wife of a stockholder, taking his stock on a pre-existing debt, with full knowledge of how he acquired it, is not an innocent purchaser, and takes subject to the debt of her husband to the corporation for fraudulent diversion of the proceeds of treasury stock, where the by-laws prohibited transfers until the stockholder's debt to the company was first paid.

SAME—PRESUMPTION AS TO OWNERSHIP—ESTOPPEL. Where stock was voted upon a by-law prohibiting transfers until indebtedness to the company was first paid, as the stock of one of the original subscribers then indebted to the company, it must be presumed to have been his stock at the time.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered August 3, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money wrongfully diverted by trustees and stockholders of a corporation. Affirmed.

Ben F. Tweedy and *Elmer E. Halsey*, for appellant.

John O. Bender, for respondent.

MOUNT, J.—The defendants were promoters of the respondent corporation. Prior to the organization of this corporation, the defendants secured options to purchase cer-

[1]Reported in 110 Pac. 425.

tain mining claims and water rights, for the price of $15,000. These options were assigned to the defendants L. D. Lively and C. O. Howard, in trust for the corporation which was to be formed. After the corporation was organized, the mining claims and water rights were deeded to the corporation. The corporation was organized under the laws of this state, with a capital stock of $2,000,000, divided into shares of the par value of one dollar each. The ten defendants each subscribed for 200,000 shares of the capital stock, and agreed that each should contribute 60,000 shares of stock to the treasury of the company to be sold for the purpose of developing the mining claims, thus leaving 600,000 shares of the capital stock in the treasury and 140,000 shares to each of the promoters.

The defendant C. O. Howard advanced the $15,000 necessary to purchase the mining claims. Thereupon the defendants, including Howard, entered into a writing, whereby they each agreed to transfer to Howard 4,000 shares of stock, to be sold by him and the proceeds thereof applied in repayment of the money advanced for the purchase of the mining claims and expenses of obtaining patents therefor, and said Howard was to account for any balance which might remain from the proceeds of such sale. These 4,000 shares of stock were charged on the books of the corporation against the stock account of each of the defendants, leaving a balance of 136,000 shares to the credit of each of the defendants, and the 40,000 shares thus contributed were credited to defendant Howard as trustee. Thereafter the treasury stock was placed on the market and sold at seventy-five cents per share, less fifteen per cent commission for selling the same. After stock had been sold to the amount of 40,000 shares at seventy-five cents per share, the trustees, who were then the original promoters, took the proceeds and applied it to the repayment of the $15,000 advanced by Howard for the purchase of mines, and also took the further sum of $9,970 which amount Howard had expended in obtaining patents for

the mining claims, and this sum was also repaid to Howard. Afterwards, when other directors were elected, this action was brought to collect from the original ten trustees and stockholders the sum of money thus diverted from the treasury.

The appellant M. A. Lively intervened in the action, claiming to be an innocent purchaser for value of the stock of the defendant L. D. Lively, and also claiming that L. D. Lively was not indebted to the corporation. Upon the trial of the case, the trial court found that each of the original ten stockholders was indebted to the corporation in the sum of $2,497, being his proportionate share of the money taken from the treasury to pay the cost of the mining claims and for obtaining patents therefor, and that the corporation had a lien on the stock of each for that amount; and directed a sale of the 4,000 shares subscribed for that purpose first to be made, and then a sale of the remaining stock of each of the original trustees, if necessary, to pay the balance. The intervener only has appealed.

It is readily seen that each of the original stockholders obtained his stock without any consideration whatever. The evidence shows that the mines were paid for by Howard. Title was conveyed to the corporation in consideration of the capital stock of the company. Thereafter treasury stock, or stock belonging to the corporation, was sold, and the proceeds diverted to reimburse Howard for the money which he had paid for the mines. So that the net result was that the promoters had their money returned to them, and they also had their stock, less 4,000 shares which had been transferred to the name of Howard as trustee. This stock was, however, issued to purchasers of the treasury stock. It needs no argument or authority to show that this was a fraud upon the persons who purchased the treasury stock, the proceeds of which was to go into development and not to the purchase of the mines. These purchasers of treasury stock afterwards came into control of the corporation and caused this suit to be brought.

It is argued by the appellant that she is an innocent purchaser of the stock of L. D. Lively, and also that this stock is not liable for any debt owing by Mr. Lively to the corporation. It appears that L. D. Lively is the husband of the defendant M. A. Lively, the intervener; that Mr. Lively transferred his stock to his wife on May 11, 1906, by assignment, and no transfer has ever been made upon the books of the company. The consideration for this assignment was $20,000, which was at that time owing from Mr. Lively to his wife. On the 12th day of June, 1906, at the regular annual meeting of the stockholders of the corporation, a by-law was passed which provided, among other things, as follows:

"The stock of the corporation shall be held for the indebtedness of the owner thereof to this company, and no transfer of the same shall be made on the books of the company until said indebtedness shall first be paid."

Mr. Lively was not present, but he sent his proxy, and the stock standing in his name was voted at the time this by-law was passed. Mrs. Lively testified that she was fully informed of the manner by which Mr. Lively acquired his stock, and that she was aware of the whole transaction. Under these facts we are satisfied that the court was right in concluding that Mrs. Lively was not an innocent purchaser for value. No new consideration passed at the time she purchased the stock. She took the stock upon an existing debt, and she was fully informed about the whole matter, and she therefore took the stock with notice and held it subject to the claims of the corporation, even if she obtained it before the passage of the by-law. It may be that the corporation would not be authorized to pass a by-law which would have a retroactive effect, but in this case the stock had not been transferred upon the books of the corporation. It still stood in the name of Mr. Lively. No request had been made for a transfer at the time this by-law was passed. Mr. Lively, or his agent, voted the stock at that meeting. It must be assumed, therefore, that the stock at that time was the stock of

Mr. Lively and not that of his wife, and since she was not an innocent purchaser for value, she acquired no greater rights than her husband had.

The judgment of the trial court appears to be right, and it is therefore affirmed.

RUDKIN, C. J., PARKER, CROW, and DUNBAR, JJ., concur.

[No. 8758. Department Two. August 8, 1910.]

CHAS. S. MILLER *et al.*, *Respondents*, v. J. A. CAUGHREN *et al.*, *Appellants*.[1]

APPEAL—REVIEW—FINDINGS OF REFEREE. The findings of a referee upon conflicting evidence sustained by the trial court will not be disturbed on appeal.

JOINT ADVENTURES—PARTNERSHIP—AUTHORITY OF PARTNER. The officer of the freight department of a copartnership engaged in a joint steamboat venture has authority to agree with the manager of the boat as to freight charges not covered in the agreement between the joint owners of the boat.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 24, 1909, upon the findings of a referee in favor of the plaintiffs, in an action for an accounting. Affirmed.

Robertson, Miller & Rosenhaupt, for appellants.

P. C. Shine, for respondents.

MOUNT, J.—The respondents and the appellants in this case were two independent partnerships. The latter partnership was engaged in business as general railroad contractors, constructing a line of railroad along the Columbia river. In 1906, these two partnerships in common built and operated a steamboat on the Columbia and Snake rivers, for the purpose of carrying freight and passengers for the appellants and their subcontractors. It was agreed that the two copartner-

[1]Reported in 110 Pac. 32.

ships should share equally the profits and losses of the steamboat venture. This action arose upon a final accounting between the parties. This appeal is from a final judgment upon the accounting.

The only question presented is, whether the charge for freight carried for subcontractors of the appellants should be five dollars per ton or six dollars per ton. The referee to whom the case was tried found that the agreement was for six dollars per ton. The trial court sustained that finding. The evidence upon this question is in conflict, and we shall not disturb the finding. Appellants argue that the articles of copartnership provided for five dollars per ton for freight; and also argue that one of the members of the appellant partnership could not change that article without the assent of the other partners. It is true there was some talk at the time the members agreed to build and operate the boat that freight could be carried at five dollars per ton, but there was no fixed rate for freight agreed upon at that time. Subsequently the member of the appellant company who had charge of the freight department agreed with the manager of the boat to make the charge six dollars per ton for freight carried, and this rate was well known and was acted upon after that time. It is clear that the officer of the appellant company having charge of its freight department would have authority to agree with the carrier upon the freight rate to be charged where none had been definitely fixed.

The judgment must therefore be affirmed.

RUDKIN, C. J., CHADWICK, CROW, and DUNBAR, JJ., concur.

[No. 8737. Department One. August 8, 1910.]

FRED N. PATTERSON, *Appellant*, v. WENATCHEE CANNING COMPANY, *Respondent*.[1]

BAILMENT—CONTRACTS—SUFFICIENCY—PAROL EVIDENCE—PLEADINGS—ISSUE. A brief written memorandum reciting that defendant rented to plaintiff a certain cold storage room for storing beef at a certain price, to begin at a certain time, does not create a complete contract of bailment, rendering the defendant liable for negligence in maintaining the storage at the proper temperature; and it may be shown by parol that it was contemporaneously agreed that the defendant should not have possession of the meat, but that the plaintiff should have complete control and possession of the room and direction over the temperature.

WAREHOUSEMAN—NEGLIGENCE—DEFENSES—PLEADING—ISSUES. In an action against a warehouseman for loss sustained by reason of negligence in failing to keep beef in sold storage at a proper temperature, an answer, affirmatively alleging that it was agreed in renting the cold storage room to plaintiff that plaintiff should have complete control and possession of the room and should and did direct its refrigeration, raises the issue that the loss occured through the plaintiff's fault.

Appeal from an order of the superior court for Chelan county, Ronald, J., entered January 7, 1910, granting defendants a new trial in an action on contract, after a trial and the verdict of a jury rendered in favor of the plaintiff. Affirmed.

Reeves & Reeves, for appellant.

Ludington & Kemp, for respondent.

GOSE, J.—There was a former appeal in this case. *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721. The case was tried to a jury, resulting in a verdict and judgment for the plaintiff. The plaintiff prosecutes this appeal from an order granting a new trial. A succinct statement of the admitted facts and issues is essential to a proper understanding of the case. The respondent is the owner and

[1]Reported in 110 Pac. 379.

proprietor of a cold storage plant, and on October 30, 1906, it executed a written memorandum of agreement as follows:

"Wenatchee, Wash., Oct. 30, 1906.

"Agreement entered into between the Wenatchee Canning Co. and Fred N. Patterson, said canning company renting to Mr. Patterson cold storage room No. 3 to be used for storing beef. Consideration $100 per month, or in proportion to that amount according to space used. Rental to commence Monday, November 5, 1906.

"Wenatchee Canning Co., per L. G. Olds."

About November 18 following, the appellant placed a quantity of fresh meat in respondents' cold storage room No. 3, a large part of which decayed and became unfit for use. Appellant alleges that the loss occurred through the failure of the respondent to keep the room at a proper temperature, and through its failure to keep pure, fresh air circulating through it. The respondent denied these charges of negligence, and averred affirmatively, in substance, that, at the time of executing the memorandum agreement and subsequent thereto, it was agreed that the appellant should have complete control and supervision of the room, and that he should, and did, direct the manner in which it should be refrigerated and aired. This is put in issue by the reply. During the progress of the trial the respondent sought to prove the facts alleged in its affirmative defense and the evidence was excluded, the court being of the opinion that upon the former appeal we had held that the memorandum was a complete contract of bailment. In considering the motion for a new trial, the court concluded that it had erred in excluding the evidence.

The appellant contends, that we ruled upon the former appeal that the writing was complete in itself; that it created a bailment and gave the bailee the exclusive possession of the property; and that evidence of a parol contemporaneous or subsequent agreement is inadmissible to establish the facts affirmatively pleaded in the answer. In this respect we think counsel has misconstrued our former opinion. What we held

was that the record, the writing, and the parol testimony, admitted without objection, established the bailment. We did not hold that the writing itself had that effect. Indeed, a reference to the memorandum will disclose that it is incomplete. There could be no bailment until the meat had been stored. The storage did not take place until some two weeks after the writing was signed. It is well settled that a bailee may by contract exempt himself from liability except for his own fraud or negligence. 5 Cyc. 175. In this case the testimony of the appellant discloses that the respondent did not have the exclusive possession of the meat. It gave no receipt, and the appellant stored and withdrew it at his pleasure. A special contract of bailment prevails against general principles of law applicable, in the absence of an express agreement. *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496.

We think the issues presented for determination were: (1) What was the contract; who was to direct the temperature of the room, the placing of the meat, and the circulation of the air? and (2) if there was no express contract, then it was the duty of the respondent to use reasonable care for the preservation of the property. The determination of the first question depends, not upon the memorandum alone, which is little more than a receipt, but upon it and parol testimony as to the entire contract contemporaneous with and subsequent to the execution of the memorandum. In *Hirsch v. Salem Flouring Mills Co.*, 40 Ore. 601, 67 Pac. 949, 68 Pac. 733, it was contended by one party that a warehouse receipt in the following language:

"No. 1769.

"Salem Flouring Mills Co., Salem, Oregon, Sept. 11, 1897.

"Received in store for account of Fleischner, Mayer & Co., two hundred and twenty-nine and sixteen-sixtieths bushels of merchantable wheat in bulk, subject to their orders (damages by the elements excepted), on or before the first day of July next, on payment of two and one-half cents per bushel storage, and three and one-half cents per bushel for sacks, and the return of this receipt properly endorsed. The wheat be-

ing delivered on boat or cars sacked. It is understood and agreed that the Salem Flouring Mills Co. are to have the first refusal of said wheat.

"Bushels, 229 16-60.

"Salem Flouring Mills Co., Per Holland."

was the entire contract; whilst the other asserted that the receipt did not contain all the terms of the contract under which the grain was received and accepted. The trial court took the view that the receipt was the entire contract between the parties, and could not be contradicted or varied by parol. It was held, that the pleadings made an issue as to whether the receipt contained the terms and conditions upon which the grain was delivered and received; that to the extent that the receipt is silent as to the terms of the contract, it may be shown by parol, and that when its language is ambiguous or uncertain it must, like other contracts, be open to parol testimony and interpreted in the light of surrounding circumstances.

As an illustration of the issue, let us suppose that A gave B a receipt, stating that he agreed to pasture a certain number of cattle for the latter for a definite period of time at a fixed price. In a suit by the latter for damages for loss of the cattle on account of defective fences or insufficient water, it would be competent for A to prove that, at the time of signing the receipt, it was agreed that B should maintain the fences and attend to watering the cattle. Such evidence would supply that which was omitted from the contract, rather than vary its terms. If loss occurred from the failure of the appellant to use ordinary care in handling or inspecting the meat, or in directing the refrigeration of the room, if these duties were put upon him by the contract as the answer avers, he cannot recover. In other words, he cannot recover if the loss occurred through his own fault or negligence. *Taussig v. Bode & Haslett*, 134 Cal. 260, 66 Pac. 259, 86 Am. St. 250, 54 L. R. A. 774.

The appellant insists that this issue is not presented by the

pleadings. With this view we cannot concur. As we have seen, it is affirmatively pleaded that, by the terms of the contract, the appellant was to have complete control and supervision of the room, and was to, and did, direct the temperature at which it should be kept.

If the duty to maintain the room at a proper temperature was devolved upon the respondent by express contract, it was required to use reasonable care to preserve the meat. It would be subject to the same duty if there was no express contract. What constitutes reasonable care varies with the business of the bailee and the nature, value, and situation of the property. *Preston v. Prather*, 137 U. S. 604.

The judgment is affirmed.

RUDKIN, C. J., MORRIS, FULLERTON, and DUNBAR, JJ., concur.

[No. 8519. *En Banc.* August 8, 1910.]

W. G. MERCER, *Respondent*, v. LLOYD TRANSFER COMPANY, *Appellant*.[1]

APPEAL—NOTICE—TIME FOR TAKING. Where appellant moved for a new trial, the time for taking an appeal commenced to run on denial of the motion.

APPEAL—RECORD—STATEMENT OF FACTS—TIME. A proposed statement of facts is in time if filed and served within thirty days after the time for taking an appeal begins to run.

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE. No question of the master's duty to furnish a safe place to work is involved where a teamster's assistant was injured while holding heavy iron plates improperly loaded on a truck by himself and the driver, the instrumentalities being proper and sufficient and the dangerous method of loading being readily observable.

SAME—FELLOW SERVANTS—COMMON EMPLOYMENT. A teamster and his assistant are fellow servants where they were engaged in the common undertaking of loading heavy iron plates on a truck, both were experienced men, and they conferred together as to the proper manner of loading them.

[1]Reported in 110 Pac. 389.

Appeal from a judgment of the superior court for King county, Joiner, J., entered June 4, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Reversed.

Kerr & McCord, for appellant.

Vernon W. Buck, for respondent.

Crow, J.—Action by W. G. Mercer against Lloyd Transfer Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

Respondent moves to dismiss the appeal for the reason that the notice of appeal was not served in time. The verdict was returned and the final judgment was entered on June 4, 1909. The order denying appellant's motion for a new trial was entered on September 18, 1909, on which date the time for appeal commenced to run. The notice was filed on November 5, 1909, within time. Appellant also moves to strike the statement of facts, contending that it was not filed in time. A proposed statement of facts, in the absence of any extension of time, must be filed and served within thirty days after the time begins to run within which an appeal can be taken. Respondent's proposed statement was filed and served within the thirty days, on October 12, 1909. The motion to dismiss and the motion to strike are both denied.

Appellant made and filed its alternative motion for judgment notwithstanding the verdict, or for a new trial, which was denied, and we find it necessary to consider only its contention that the trial court erred in denying the motion for judgment notwithstanding the verdict. The following undisputed facts appear from the evidence: That appellant is a transfer company in the city of Seattle, engaged in handling and transporting all kinds of goods, wares, and merchandise; that respondent was in its employ at the time of his injuries, being engaged as helper to one Peters, a driver, also employed by appellant; that respondent and Peters went

to a warehouse in Seattle to load upon one of appellant's trucks four iron plates, weighing about nine hundred pounds each, and transport them a distance of about three city blocks; that the plates were about six feet long and four feet wide; that the bed of the truck was six feet wide and much longer than the plates; that respondent and Peters and two employees of the warehouse loaded the plates on the truck; that instead of placing them flat or in a horizontal position, and for the purpose of unloading with greater ease, they stood them upon the bed of the truck, upon edge, and leaned them at an angle of about forty-five degrees against certain posts or stanchions; that after the plates were on the truck respondent asked Peters if he did not intend to tie them; that Peters replied in the negative; that thereupon respondent stood upon the truck and held the plates with a stake; that when the truck was crossing a railway track, one of its wheels commenced to slide on striking a rail; and that the plates toppled and fell against respondent.

Respondent alleged that the appellant was negligent, (1) in failing to furnish him a safe place in which to work; (2) in that its foreman carelessly and negligently ordered him to dispense with tying the plates; and (3) in that Peters drove across the railway track in a careless and negligent manner. The appellant pleaded the affirmative defenses of assumption of risk, contributory negligence, and negligence of a fellow servant. Respondent's allegations of negligence on the part of the foreman and of Peters, the driver, were properly withdrawn from the jury for want of evidence to sustain them. This leaves for consideration the single question whether appellant was negligent in failing to furnish the respondent a safe place in which to work. This issue was submitted to the jury by the trial judge who, in his instructions, said:

"I instruct you that in order for the plaintiff to recover it must be found that the place was unsafe and that he went to work in an unsafe place upon the direction of the teamster,

Peters, and that Peters had authority to direct his actions in that particular."

We fail to see how the doctrine of safe place or the question of a vice principal can be involved in this action. It appears that Peters, the driver, and respondent, as appellant's employees, were jointly engaged in the task of loading plates; that they were each in such a situation as to afford them a controlling influence the one over the other, and that the only negligence, if any, was their joint act in improperly loading the plates. There is no claim that the truck was defective, out of repair, or unfit for the purpose for which it was being used. It was a proper and safe instrumentality provided by the master; nor was there anything necessarily dangerous about the place in which they were working. The only dangerous element which at any time threatened them, or injured the respondent, was one which he and Peters unnecessarily created by loading the plates in an improper and unsafe manner, the danger of which should have been readily observed by any reasonably prudent man. The element of safe place does not enter into this case, nor can we hold that Peters was a vice principal. It is manifest that he and the respondent were fellow servants. They were engaged in the common undertaking of loading and transporting the iron plates. They conferred together in reference to their work and the manner of its performance. Respondent asked Peters whether he intended to tie the plates. Peters replied: "No, you can hold them." Without objection, respondent thereupon attempted to do so with the aid of a stake held against the plates. Respondent's question and Peters' answer positively show that they considered and discussed the question of safety in loading and handling the plates; that they exercised their own judgment, and acted accordingly. The respondent knew the element of danger involved and, without protest, assented to and adopted an unsafe method of securing and holding the plates, which resulted in the accident. No negligence on the part of appellant has been shown. It

had provided proper appliances. Respondent and the driver were both experienced men, were engaged as fellow servants in performing the common work of loading. If either or both of them made a mistake and were guilty of negligence, the master cannot be held liable in the absence of negligence on its part. The respondent in part testified as follows:

"Q. And you loaded it up on edge, on the truck, Mr. Mercer, instead of putting it down flat on the truck so that you could handle it more easily over at the dock when it came to unload it than if it was lying flat? A. Yes, sir. Q. You knew also if you had laid it down upon the bottom of the truck flat, there would have been no possibility of its turning over on anybody, didn't you? A. No, certainly not, but they wouldn't take the time to do it. Q. You would not take that time. You knew also that if that iron did turn over that you were trying to hold and prevent from turning over that it might catch you and injure you? A. I never gave it a thought. Q. But if you had thought about it you would have known well enough that if you failed to hold it and it actually toppled over there it was liable to catch you between the stakes on the other side of the truck and hurt you? A. Yes, it naturally would. Q. And you didn't stop to think about that at all. Now, if I got your testimony right, and if I didn't want you to correct me, you testified: 'I said to Pete, aint you going to tie those plates, and he said No, and I tried to hold them and he struck the rail going fast and they turned over and hurt me.' That was your testimony, was it? That is the way it happened? A. Yes. Q. Now, have you ever hauled those plates before? A. I have hauled different plates. Q. You have hauled all kinds of iron including these strips of iron, haven't you? A. Yes. Q. And all lengths and all widths and all weights practically? A. Yes. Q. You had always or as a rule with thick plates and wide plates of iron, you had leaned them up against the stakes just as you did that day? A. No. Sometimes. Generally we hauled all those plates on the big flat wagon. Q. Then you laid them down flat, did you? A. Yes, sir."

This evidence and other statements made by respondent show that the negligence which caused the accident cannot be charged to the appellant. This case falls within the rule

announced in *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034, and *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405. In the latter case two laborers, one claimed by the plaintiff to have been a vice principal, were unloading lumber from a car, and this court, after quoting from *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727, said:

"This case, it seems to us, falls squarely within the illustration given in that case where the doctrine of fellow servant should apply. The two men were working together. They were both under a common employment; both conceded to be common laborers. They were conversing and counseling about the manner of unloading the lumber. One of them steadied the stakes to keep them from toppling over, while the other one cut them off. It was a simple service which was to be rendered. There was no machinery involved, intricate or otherwise. The respondent could see clear around the whole transaction. He was working side by side with his co-laborer, each assisting the other in the details of the work, and in a position where he could have protected himself against the negligence of his co-laborer if he had paid any heed to him."

So here, respondent and Peters were working together as fellow servants, engaged in the common employment of loading iron plates upon appellant's truck. They consulted about the method of placing and securing the load. Respondent, adopting Peters' suggestion without objection, used a stake to hold the iron plates, thereby voluntarily adopting an unsafe method, and the injury resulted. The master gave no directions, either as to the method of loading, or securing the load, was guilty of no negligence, and cannot be held liable. Appellant's motion for judgment notwithstanding the verdict should have been sustained.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

Rudkin, C. J., Morris, Gose, Mount, Dunbar, and Parker, JJ., concur.

[No. 8674. Department One. August 8, 1910.]

R. W. CAYWOOD, *Appellant*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.[1]

TRIAL—INSTRUCTIONS—ISSUES—EVIDENCE. An instruction relating to continuous snow and freezing weather is warranted by the evidence that dry snow began at 6:30 o'clock in the morning and continued until 6 o'clock in the evening, and that the highest temperature during the day was 22 degrees.

TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. An instruction as to the rule to be applied by the jury "if they find" that there was continuous snow and freezing weather during the day does not assume that such was the fact.

TRIAL—INSTRUCTIONS—TAKING QUESTION FROM JURY. The question of negligence on other points is not taken from the jury by an instruction which states that a special finding will be submitted on one question, where the other questions were submitted on other instructions.

CARRIERS—PASSENGERS—CONTRIBUTORY NEGLIGENCE. Where a passenger on a street car has signaled the conductor to stop and the signal has been answered before he left his seat, he cannot justify his leaving the seat while the car was traveling at a high rate of speed by the fact that it was sometimes necessary for passengers to leave their seats in order to attract the attention of the conductor.

CARRIERS—PASSENGERS—NEGLIGENCE—SNOW AND ICE ON STEPS. It is not evidence of negligence that snow and ice accumulated on the steps and at the entrance of a street car between the time a passenger boarded the car in the down town district and the time he reached his destination.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 15, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by a passenger in alighting from a street car. Affirmed.

Reynolds, Ballinger & Hutson, for appellant.

James B. Howe and *A. J. Falknor*, for respondent.

[1]Reported in 110 Pac. 420.

FULLERTON, J.—The respondent owns and operates an electric street railway in the city of Seattle. The appellant, while a passenger on one of the respondent's cars, fell therefrom and received severe and permanent injuries. The appellant conceived that his fall was due to the negligent manner in which the car was operated, and brought the present action to recover for his injuries. As ground of negligence he alleged that it was the custom of the street car company to approach the place at which he desired to alight at such a high rate of speed as to carry passengers beyond it, unless such passengers got out of their seats and took a position in either the space provided in the car for entering and leaving it or on the steps of the car, and that it had become a custom for passengers desiring to alight at the particular station to take one of such positions; further alleging that such custom was reasonably safe when the cars were operated at an ordinary and reasonable rate of speed, and was commonly indulged in by persons of ordinary prudence. He then alleged that the car on which he was riding at the time he received his injuries approached the station in question at a high rate of speed, and that he

"for the purpose of alighting from said car, signalled the conductor to stop said car at said station and, mindful of said custom and because thereof, went back to the entrance of said car to await its arrival at said station, and when said car had reached a point about one hundred and fifty feet from said station plaintiff started to go down upon the steps of said car for the purpose of alighting when the same should stop; that plaintiff was holding firmly to an iron stanchion or pipe dividing said space, with his left hand, and was observing due and proper care and caution for his own safety and was without negligence in the premises, and suddenly, and without warning to plaintiff and at the moment plaintiff started to go down said steps to be in a position to alight from said car when the same should stop, the motorman in charge of said car and of the running and stopping of said car, checked the speed of said car with unnecessary suddenness, causing the same to give a violent, sudden and unnecessary jerk, and suddenly and unnecessarily reducing the speed

of said car from the very high rate at which it had been going to a very low rate of speed, thereby, and by reason of the slippery condition of said entrance to said car and of said steps and the extra hazard caused by said defendant compelling passengers to be at the entrance of said car while in motion in order to alight from said car at said station, plaintiff was violently thrown to the ground by the side of said track; that said ground was frozen, and plaintiff struck upon it upon his head and arm and right knee, thereby receiving the injuries hereinafter set forth; that said throwing of plaintiff to the ground was in no manner due to any negligence upon his part, but was wholly due to the carelessness and negligence of defendant and its agents and servants in permitting snow and ice to accumulate upon said entrance and steps of said car, and in suddenly checking the speed of said car with unnecessary violence and with an unnecessary jerk, and in compelling passengers desiring to alight at said station to be at the entrance to said car or upon said steps while said car was in motion."

Issue was taken on the allegations of the complaint, and a trial had which resulted in a verdict for the respondent, and a special verdict to the effect that there was no sudden checking of the speed of the car, nor violent, sudden or unnecessary jerk given the car, after the appellant got down onto the car steps for the purpose of alighting. Judgment was entered on the verdict, and this appeal was taken therefrom.

The errors assigned are predicated upon the instructions of the court to the jury. The following were given, to which the appellant excepted:

"In this action I charge you that if you find that there was continuous snow and freezing weather during the day of the accident, the plaintiff would have no right to assume that the evidence of snowstorm would be immediately and effectually removed from the exposed portion of the steps and the entrance to the street car upon which he was riding; that the prevalence of such weather would impose upon the plaintiff such extra care to look out for his safety as an ordinarily prudent and careful person would exercise under like circumstances, and if he failed to exercise such care and was injured through such failure, then he is not entitled to recover.

"In other words, gentlemen of the jury, you must find one thing in this case before you can return a verdict against the company, and that one thing that you have to find is, 'was said car stopped or operated in such a way as to cause a sudden jerk, and through that sudden jerk was plaintiff thrown to the ground?' and on that one matter the court is going to submit to you, at the request of the respondent company, a special finding."

It is objected that the first instruction is misleading because based upon the assumption that a snowstorm was prevailing upon the day of the accident, whereas, in fact, no such storm was then prevailing. The witness, an observer at the United States Weather Bureau, at the page in the record cited by counsel to show the absence of a snowstorm on the day in question, testified as follows:

"The record shows that the dry snow began at 6:30 o'clock in the morning and continued until six o'clock in the evening. And the total precipitation melted from the snow for the day was eight hundredths of an inch. At five o'clock in the evening there was one inch of snow on the ground. At noon a special observation was taken; and up to that time the amount of precipitation melted from the snow fall was six hundredths of an inch. The day was cloudy and cold. The highest temperature reached during the day was 22 degrees, and the lowest temperature was eighteen degrees."

It would seem that this would meet the objection made by counsel even had the court assumed the prevalence of such a storm. But an examination of the instruction will show that the learned trial judge made no such assumption. On the contrary, he left it for the jury to find whether or not there was "continuous snow and freezing weather during the day of the accident," instructing them to apply the rule of law given only in case they found the fact to exist. The record justified the instruction, and we find no error therein.

To the second quoted instruction it is objected that it took from the jury the questions of negligence arising from the fact that passengers desiring to alight at this station were compelled to arise and go to the entrance way and steps of

the car in order to prevent being carried beyond it, and the fact that snow and ice had been permitted to accumulate on the steps and in entrance way to the car at the time of the injury. We think, however, there was no error here. That it was not the purpose of the court to withdraw these questions from the jury is made clear by the fact that it submitted the very questions to their determination in other instructions in which the point for decision was stated with such accuracy as to meet with the approval of both sides.

But if it can be said there is a possibility that the jury were led to believe that their right to consider these questions depended upon the view they took of the question specially submitted, we still find no ground for reversing the judgment. It is made clear by the evidence that the appellant was not compelled to resort to the alleged custom in order to attract the attention of the conductor on this particular occasion. On the contrary, he himself testifies that the conductor had recognized his indicated desire to get off at the station to which the car was approaching and had signalled the motorman to that effect before he had left the inclosed part of the car. He testified further that, notwithstanding he had knowledge of the fact that a signal to stop had been given and that the car was running at a high rate of speed, he proceeded on his way to the entrance and started to go down the steps, before he fell from the car. Under these circumstances he cannot justify his act of leaving his seat and going to the entrance of the car by the fact that it was sometimes necessary for passengers so to do in order to attract the attention of the conductor. He must show that the necessity existed, or that he had the right to think it existed, in the particular case before he can avail himself of the custom.

With reference to the other question, it was testified by the appellant and by one of his witnesses that snow and ice existed on the steps of the car and in the extrance way of the same at the time the appellant fell therefrom, but whether much or little was not stated. Nor was there any evidence tend-

ing to show that it had existed there for any considerable length of time. On the contrary, the evidence that does touch the question is the other way. The appellant himself testified that when he boarded the car in the down town district he saw no snow or ice either on the steps of the car or in entrance way, and thinks there was none. Such snow and ice as had accumulated in these places, therefore, must have accumulated during the passage of the car from the place where the appellant boarded it to the place where he fell therefrom, and as but a trace of snow fell during that trip, the ice and snow must have been brought in by the feet of the passengers who boarded the car between those points. But the fact that some snow and ice may have accumulated by this means is not evidence of negligence on the part of the company. It is not practicable to prevent such a condition when there is snow falling or there is snow upon the ground. As was said in the case of *Riley v. Rhode Island Co.*, 29 R. I. 143, 69 Atl. 338, 11 L. R. A. (N. S.) 523;

"In the case at bar we think it would be unreasonable to hold that it was the duty of the defendant corporation to prevent the step from becoming slippery by the ingress of passengers during the passage of the car along its route. In a climate such as ours the effectual performance of such a duty would at times cause serious inconvenience to the traveling public, and during the continuance of a storm would be impossible. The prevalence of stormy weather and a freezing temperature imposes upon a passenger an extra degree of care, which he cannot expect the carrier to save him from. He must bear his share of the burden of 'the inconstant year.'"

There was, therefore, no evidence in the record justifying a recovery on these branches of the case considered as independent grounds of negligence, and hence there was no error on the part of the court in taking them from the jury, even were it conclusive that the instruction complained of had that effect.

The judgment is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8652. Department One. August 8, 1910.]

BERLIN MACHINE WORKS, *Appellant*, v. H. J. MILLER *et al.*, *Respondents*.[1]

SALES—CONTRACTS—ENTIRE OR SEVERABLE. A contract of sale of one band resaw and one self-feed ripsaw is severable and not entire, although only one price was fixed for the two machines, where such intent appears from the whole contract, which warranted one of the machines, money paid to be refunded if not as guaranteed, and provided that retention of the other machine after sixty days should constitute a trial and acceptance, the sale of one machine being absolute and the other conditional.

SALES—ACCEPTANCE—SEVERABLE CONTRACT. Where a contract for the sale of two machines was severable, the acceptance of one does not work an acceptance of the other.

SALES—GUARANTY—PREFERENCE. A guaranty that a saw would cut a given quantity from given materials in a certain time is not fulfilled by the fact that it could cut an equivalent quantity from materials different from those described.

SALES—ACCEPTANCE—USE AFTER REGULATION. The use of a guaranteed saw for five months after its rejection does not constitute an acceptance, where it was unable to do the heavy work for which it was guaranteed, and the vendor did not exercise its option to repay freight and remove it from the vendee's premises, but attempted to correct the defect to make it comply with the guaranty, and never formally tendered it to the vendee.

SALES—RECOVERY OF PRICE—PARTIAL PERFORMANCE—SEVERABLE CONTRACTS. Where a sale of two machines for one price was severable, and one of the machines was accepted and used and the other rejected because not up to the guarantee, the vendor may recover the price of the accepted machine, according to the list prices of the two machines, or a fair proportion of the contract price, to be determined by the court.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered August 3, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Bausman & Kelleher, for appellant, contended that the contract was an entire contract, and could not be rescinded

[1]Reported in 110 Pac. 422.

in part. *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077, 117 Am. St. 1032; *Seattle Nat. Bank v. Powles*, 33 Wash. 21, 73 Pac. 887; *White v. Miller*, 132 Iowa 144, 109 N. W. 465, 8 L. R. A. (N. S.) 727; *Mansfield v. Trigg*, 113 Mass. 350. Acceptance at the end of the trial period was conclusive. Williston, Sales, p. 375, § 272; *Wendall v. Osborne*, 63 Iowa 99, 18 N. W. 709; *Brown v. Russell*, 105 Ind. 46, 4 N. E. 428; *Wolf Co. v. Northwestern Dairy Co.*, 55 Wash. 665, 104 Pac. 1123; *Staver v. Rogers*, 3 Wash. 603, 28 Pac. 906; *Wasatch Orchard Co. v. Morgan Canning Co.*, 32 Utah 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540; *Pratt & Co. v. Langston Mercantile Co.*, 111 Mo. App. 96, 85 S. W. 134; *Columbia Rolling Mill Co. v. Beckett Foundry & Machine Co.*, 55 N. J. L. 391, 26 Atl. 888; *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227; *King v. Towsley*, 64 Iowa 75, 19 N. W. 859. The burden was upon the defendant to show breach of warranty. *Burt v. Garden City Sand Co.*, 237 Ill. 473, 86 N. E. 1055. Attempts to aid the customer in operating a machine do not waive the manufacturer's right to stand on his rights. *Wendall v. Osborne*, 63 Iowa 99, 18 N. W. 709. Defendants' use of the machine was inconsistent with its rejection. *Fox v. Wilkinson*, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. (N. S.) 1107; *Empire Steam-Pump Co. v. Inman*, 59 Hun 230, 12 N. Y. Supp. 948; *Baker v. Robbins*, 51 Wash. 467, 99 Pac. 1.

George Dysart and *Hayden & Langhorne*, for respondents, cited: *Gove & Co. v. Island City Mercantile & Milling Co.*, 16 Ore. 93, 17 Pac. 740; *Widman v. Gay*, 104 Wis. 277, 80 N. W. 450; *Manitowoc Steel Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515; *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Edison Gen. Elec. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Clarke v.*

Johnson Foundry & Machine Co., 19 Ky. Law 973, 42 S. W. 844; *City of Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

FULLERTON, J.—The appellant delivered to the respondents two certain machines; namely, a self-feed ripsaw and a band resaw, under the following contract of sale and guaranty:

Chehalis, Sept. 4th, 1905.

Berlin Machine Works.

Main Office and Works: Beloit, Wisconsin.

Subject to strikes, accidents or other delays beyond your control, please ship in good order the following Machinery, delivered F. O. B., Beloit, Wisconsin, about 1 week:

One latest improved 'Pilot Wheel Set Works' band resaw, No. 285, 64" 8" saw—Right hand with double roller bed as per explanations attached. Furnish one saw filed and fitted.

One self-feed rip saw, style No. 254, no counter with 1 16" saw.

Man to superintend starting and prove guarantee.

Freight allowed to Startup, Wash.

All communications to Chehalis, Wash.

For which we agree to pay within 9 months after date of shipment fifteen hundred and fifty and no-100 dollars with exchange.

The purchaser agrees to make settlement within sixty days after date of shipment and to then evidence all payments due at a later date, by notes bearing date of shipment and interest.

$150.00 for freight to be sent to Wallace Lbr. Co. when advised.

$300.00 cash, 60 days from shipment.

Balance at $125.00 per month, notes 6%.

See other side for guarantee.

It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash, and that in case of rejection consignee will promptly deliver it to consignor F. O. B. at Beloit, Wis., and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after 60 days from date of shipment shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of the Berlin Machine Works.

Ship via with Wallace Lbr. Co. to Startup, rebilling to Gate, Wash.

Accepted by B. G. Williams, salesman for Berlin Machine Works, subject to approval at the main office, Beloit, Wisconsin.

H. J. Miller Lbr. Co.,
By H. J. Miller, Prop.

Received and accepted Beloit, Wis., 9-8-05, Berlin Machine Works, by Osborn.

The guaranty was written on the back of the order and was in the following words:

H. J. Miller Lbr. Co.,
Chehalis, Wash.

Gentlemen: We guarantee the No. 285 to work successfully on all classes of stock up to its full limit and to handle 3" stock from 12x12 or 14x14 up to 50,000 ft. BM in ten hours, provided saws are properly put up to stand up to work in hand. In event the guarantee is not made good, we agree to refund money paid for freight, installation and belting and remove from premises.

Accepted,
H. J. Miller Lbr. Co.,
Chehalis, Wash.,
Sept. 4, 1905.

Berlin Machine Works,
Per Williams.

The machines described in the contract were shipped to the respondents on October 3, 1905, and reached them towards the latter part of the same month. The ripsaw was immediately set up by the respondents and used regularly by them thereafter as a part of the equipment of their mill. The band resaw was set up and started under the direction of one of the appellant's assistants. This machine, according to the claim of the respondents, failed to comply with the guaranty, or work satisfactorily otherwise, and acceptance thereof was refused. This action was thereupon brought by the appellant to recover the purchase price of the machines as fixed by the contract. The respondents took issue on the allegations of the complaint, and a trial was had which resulted in a judgment in their favor. This appeal was taken therefrom.

Taking up the assignments of error in the order in which the appellant presents them, the first to be noticed is the contention that the contract is an entire contract, not capable of being severed. But it has seemed to us that the contract was severable rather than entire. It is true there was but one consideration expressed for the two machines, and there is nothing in the record tending to show that a separate

price for each machine was agreed upon. But while these considerations tend strongly to establish the entirety of a contract, and in the absence of other conditions would be controlling, we do not understand them to be conclusive in all cases regardless of what may be the remaining conditions of the contract. To so hold would violate a cardinal principal of the construction of contracts; it would be to construe the contract with reference to a part of the language employed, rather than by a reference to the whole. The entirety of a contract, it must be remembered, depends on the intention of the parties, and this intention is to be gathered from a consideration of the whole of the contract rather than from a consideration of a mere part.

Turning to the contract, it will be observed that the machines were sold under entirely distinct agreements. With reference to the self-feed ripsaw, there are no covenants of warranty whatsoever, save such as are implied from the mere fact of sale, and no obligation is assumed concerning it or its operation after it reached the respondents; it was agreed that the retention of the saw after sixty days from the date of the shipment should constitute a trial and acceptance of the saw, and that in case of rejection, it was agreed that the consignee should return it to the consignor f.o.b. at Beloit, in the state of Wisconsin. With reference to the band resaw, the consignor specially guaranteed that it would work successfully on all classes of stock up to its full limit, and that it would cut three-inch stock from pieces twelve by twelve inches, or fourteen by fourteen inches, in size up to fifty thousand feet board measure in ten hours. It was agreed that a man should be sent to superintend starting the machine and to prove the guaranty; and that if the guaranty was not made good the money paid by the respondents for freight, installation of the machine in their mill, and for belting, should be refunded them and the machine removed from their premises. There was no time fixed within which

any of these acts should be done, other than such as the law implies; namely, a reasonable time.

In view of these differences in the contract with reference to the two machines, it seems idle to suppose that the parties intended that the agreements with reference to the one machine should be deemed broken in the case the agreements were not performed as to the other. Indeed, effect cannot be given to all the provisions of the contract if it is to be treated as entire. The sale of the self-feed ripsaw was a sale absolute, and passed the title of the machine in the consignees on delivery to them, while the sale of the band resaw was a conditional sale to take effect and become consummated only when the condition under which it was sold should be performed, that is to say, when it was proved by the consignor that the machine would comply with the terms of the guaranty. These conditions are so far distinct and inconsistent that they cannot operate together, and to give effect to all of them the contract must be held severable and not entire.

The appellant cites the case of *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077, 117 Am. St. 1032, as conclusive of the question here under discussion. In that case we did say that when several articles are sold for a single and entire consideration, without any apportionment of the purchase price between them, the contract of sale is entire and cannot be severed except by the agreement of the parties. This, as a general rule, is undoubtedly correct. But we think it can admit of exceptions, and that one of these exceptions must exist in a case where, as in the one before us, the remaining parts of the contract make it clear that no such result was intended.

The appellant's second contention is that the provision in the contract to the effect that retention of the property for a period of sixty days shall constitute an acceptance applies to both machines, and it argues therefrom that there was a

retention beyond this period and a consequent acceptance. But this contention has its basis in the assumption that the contract is entire rather than severable. Since, however, we held it severable, it must follow that the acceptance of one machine was not an acceptance of the other.

The third contention is that the band resaw in fact complied with the guaranty, but we think the great preponderance of the evidence is with the conclusion of the trial judge that the machine could not be made to cut to exceed 7,000 feet board measure in ten hours out of the stock described in the contract; a quantity much less than the quantity guaranteed in the contract of sale. Based on the testimony of one of the respondent's witnesses, the appellant makes a calculation tending to show that the machine would cut in ten hours from certain materials a quantity equal to fifty thousand feet board measure, but if we concede the calculation to be correct it would not prove that the machine complied with the guaranty. The guaranty was that the machine would cut a given quantity from given materials, not an equivalent quantity from materials different from those described. The fault of the machine lay in its feed works. These were operated by a friction gear, which proved too light to keep them in motion when heavy materials such as those described in the guaranty were fed into them. The result was that the gears would slip and cause the friction to burn out. In lighter materials this difficulty was not met with, and hence the possibility of sawing a quantity equal to the guaranteed quantity from such materials; but this, as we say, is not a compliance with the guaranty.

The fourth contention is that the appellant continued to use the saw for a period of more than five months after they claim to have rejected it, and that this fact amounts to an acceptance of the saw. But we think the use of the saw by the respondents consistent with their refusal to accept it. The attention of the appellant was called promptly to the fact that the saw would not comply with the guaranty be-

cause of this defect in the feed works. The appellant was then of course at liberty to repay the money paid for freight and installation of the machine by the respondents and remove the machine from the respondents' premises, but it did not choose to do this. It sought instead to correct the defect in the machine so as to make it comply with the guaranty. The fact that the respondents submitted to this course of conduct did not amount to an acceptance of the machine. Under the contract they owed no affirmative duty in the premises. It was time enough for them to act when the machine should be formally tendered to them, and this, so far as the record discloses, was never done.

The trial court, holding the contract to be entire and not severable, reached the conclusion that there could be no recovery at all thereon. Since, however, we take the view that the contract is severable and not entire, it follows that this conclusion is erroneous. The appellant should have been allowed to recover for the self-feed ripsaw. As to this machine the sale and acceptance was complete, and the appellant is entitled to its purchase price. No difficulty ought to be experienced in ascertaining this price, notwithstanding the contract itself makes no segregation as between the two machines. The machines are standard, and were undoubtedly listed by the appellant at the time of the contract at fixed prices. Perhaps as just a way as any to determine the price of the machine would be to take such proportion of the contract price of the two machines as the list price of the ripsaw bore to the sum of the list prices of the two machines. However, any fair method should meet the approval of the court.

The judgment appealed from is reversed, and the cause remanded with instructions to the trial court to ascertain the contract price of the self-feed ripsaw and enter judgment in favor of the appellant for the amount thereof.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8620. Department One. August 8, 1910.]

L. H. BREWER, *Respondent*, v. T. M. HOWARD, *Petitioner and Appellant*.[1]

APPEAL—BRIEFS. An appeal will not be dismissed for error in entitling the case in the brief, where no one has been misled.

TAXATION—FORECLOSURE—TAX SALE—VACATION—GROUNDS. Sufficient cause is shown for the vacation of a tax judgment and sale, on petition made within one year, and it is error to deny the same, where it appears that the petitioner lived on the land and had made a good faith effort to ascertain and pay the back taxes prior to the issuance of a delinquency certificate, but was prevented by the act of the county treasurer, and he had had no notice of the suit, summons by publication having been made in a paper of limited circulation at a considerable distance from the property.

Appeal from an order of the superior court for Chehalis county, Sheeks, J., entered October 5, 1909, denying the vacation of a judgment and the setting aside of a tax deed, after a hearing before the court. Reversed.

W. I. Agnew, for appellant.

Frank L. Morgan, for respondent.

FULLERTON, J.—On August 7, 1907, the respondent, being the holder of a certificate of delinquency for unpaid taxes on certain land situated in South Aberdeen, Chehalis county, Washington, made application to foreclose the same, making parties thereto Edwin Schneider, the person in whose name the property was assessed, "and all persons unknown, if any, having or claiming to have any interest in and to the real estate hereinafter described." Summons was duly issued and placed in the hands of the sheriff for service, who made return thereon to the effect that defendant Edwin Schneider could not be found in Chehalis county, but said nothing as to the efforts he made to find and serve the "unknown" interested parties. The applicant thereupon proceeded to serve the

[1]Reported in 110 Pac. 384.

summons by publication, causing the same to be published for the required time in the Oakville Courier, published at Oakville, in Chehalis county. Judgment was afterwards entered in the proceedings and the land sold thereunder to the applicant, who was plaintiff in the proceedings.

On October 26, 1908, and within one year from the entry of the judgment, the appellant, Howard, applied to the court by petition to vacate the judgment. In his petition he alleged ownership of the property, that he was in possession thereof during the time the foreclosure proceedings were pending, that neither the summons nor notice of the pendency of the proceedings of any kind were served upon him, and that he had no knowledge of the fact that any such proceedings were pending until after the judgment had been entered therein; that he had at divers and sundry times paid taxes on his property and believed he had fully paid all taxes assessed thereon. He further alleged that the plaintiff, well knowing that he resided upon the property, sought to keep the foreclosure proceedings secret and hidden from him, and to that end caused the summons to be published in a newspaper of small circulation published in distant part of the county, a proceeding "calculated and designed to prevent said notice reaching defendant and informing him as to the pendency of said action." An allegation of tender of the amount of taxes due, and other allegations tending to show an excuse for the delay in making the application were made. The petition concluded with a prayer to the effect that the judgment be vacated and the petitioner be allowed to defend the action. An answer was filed to the petition, to which the petitioner filed a reply; the allegations contained in these pleadings need not be noticed, however, since the statute provides that the petition shall be deemed denied without answer, and that "the defendant shall introduce no new cause, and the cause of the petition shall alone be tried." Rem. & Bal. Code, § 468. The hearing resulted in a denial of the petition.

The proofs on the part of the petitioner tended in the main

to support the allegations of his petition. It was made to appear that he had owned the property for some eight or ten years, and had been in the continuous occupancy of the same, either by himself or his tenants, since 1904; that at a time prior to the issuance of the delinquency certificate he desired to mortgage the property, and called up the treasurer to ascertain if any back taxes were due on the land and was assured that there were none, although at the same time he was informed of back taxes on another tract which he included in the mortgage and which he then paid. It was made to appear, furthermore, that the newspaper in which the summons was published had but a limited circulation in the city of Aberdeen, and that its place of publication was at a considerable distance from the land, and that the petitioner did not discover the published notice, and had no notice otherwise of the pendency of the proceedings. There is no evidence in the record, however, showing that the plaintiff in the foreclosure action had a fraudulent purpose in selecting the particular newspaper in which the summons was published, or that he had actual knowledge of the petitioners ownership and possession of the property. Tender was made to the plaintiff of the taxes, as well as the costs of the foreclosure proceedings, prior to the filing of the petition to vacate.

The plaintiff moves to strike the appellant's brief and dismiss the appeal on the ground that the brief is wrongly entitled. The brief is faulty in this respect, but nevertheless we must deny the motion. Neither the court nor the respondent has been misled by the error, and it would be a gross injustice to impose so heavy a penalty for a mere harmless mistake.

On the merits of the controversy, it is our opinion that the petitioner showed sufficient cause for a vacation of the judgment, and that the trial court erred in denying his petition therefor. Aside from the general equitable features presented by the facts in the case, which appeal strongly to the conscience of the court, there was a good-faith effort made on

the part of the petitioner to ascertain and pay these taxes prior to the time a delinquent certificate was issued therefor; an effort which would have been successful but for the error of the county officer charged with the duty of collecting and receiving taxes. On the principle that such an effort by the property owner to pay back taxes is equivalent to payment, we have held that similar facts justified the setting aside of a tax foreclosure sale by a proceeding in equity after the time within which an interested party might apply for the vacation of the tax judgment had expired. *Loving v. McPhail*, 48 Wash. 113, 92 Pac. 944; *Taylor v. Debritz*, 48 Wash. 373, 93 Pac. 528; *Gleason v. Owens*, 53 Wash. 483, 102 Pac. 425; *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122. The reasoning of these cases applies with added force to a case where the interested party comes into the foreclosure action itself within the time limited by statute and petitions for a vacation of the judgment on the ground stated.

The judgment appealed from will therefore be reversed, and the cause remanded with instruction to vacate the tax judgment and allow the petitioner to appear and defend the foreclosure proceedings.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8803. Department One. August 8, 1910.]

J. W. PARKS, *Respondent*, v. S. ELMORE, *Appellant*.[1]

FRAUDS, STATUTE OF—SALES—PERSONAL PROPERTY—STATEMENT OF CONSIDERATION. Under the statute of frauds of the state of Oregon, requiring a contract for the sale of personal property of the value of over $50 to express the consideration, it is sufficient if the contract, without stating the consideration in express terms, shows mutual promises and it is evident that the promise on one part was the consideration for the promise on the part of the other.

CONTRACTS—MUTUALITY. A contract whereby plaintiff agreed to pay a certain price for fish during the season, if he purchased any from the defendant, is not lacking in mutuality because optional on the part of the plaintiff, where it contained other stipulations obligating the plaintiff to limit his catch under certain conditions and to deliver all his surplus fish to the defendant at a certain price.

EVIDENCE—CONTRACTS—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN. In an action upon a contract for the sale by a fish dealer of "my entire catch" of dog salmon, parol evidence is admissible to show that the words "my entire catch" referred to dog salmon which the dealer was compelled to purchase of fishermen in buying silverside salmon and that he did not personally engage in fishing, both parties being familiar with the facts and having operated under a similar contract the year before; since "catch" has not such a definite and fixed meaning as not to admit of explanation under any circumstances.

SALES—CONTRACTS—RESCISSION. A contract to sell fish during a season is not rescinded by a letter written by the seller to the purchaser before the season began offering to rescind the contract, where the seller made no reply to the letter.

SALES—BREACH BY PURCHASER—DAMAGES—MITIGATION. It cannot be urged that a recovery for breach of contract to purchase fish, which the seller had to destroy, was excessive, because the plaintiff might by diligence have disposed of the same for some price at a certain cannery, where the fish were offered to the defendant from day to day with notice of the disposition that would have to be made of them, and defendant did not notify the plaintiff of any market for them.

INTEREST—UNLIQUIDATED DEMAND. Interest will be allowed upon an unliquidated demand that can be ascertained by mere computation, from the time the demand accrues; and a demand for fish sold at a certain price per fish is such a demand.

[1]Reported in 110 Pac. 381.

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence is harmless in an action tried to the court without a jury.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered November 6, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

C. W. Hodgdon and *C. W. & G. C. Fulton*, for appellant.

John C. Hogan, for respondent.

FULLERTON, J.—On August 14, 1907, the appellant and respondent entered into a contract evidenced by the following writings:

"Astoria, Ore., August 14, 1907.

"Messrs. Elmore & Co.,

"Astoria, Oregon.

"Gentlemen:—In regard to our conversation this afternoon I hereby make you the following proposition with reference to the fishing on Gray's Harbor and its tributaries for the season of 1907.

"If I purchase any salmon commonly known as the merchantable black salmon from canneries in which you are interested on Gray's Harbor, I will pay you 3-4 cents per lb. over and above the regular cannery price and if you purchase any of the same class salmon from me you will pay me 1-2 cents per lb. over and above the regular cannery price.

"Fish to be weighed when delivered to either party and whatever difference in number of pounds may be remaining to be settled on basis of 21 pounds to the fish.

"Cannery prices to mean prices as paid by the canneries on Gray's Harbor.

"If I obtain any Silversides from you I am to allow 5 cents per fish over and above prices paid by the canneries on Gray's Harbor during the season of 1907, and if you obtain any Silversides from me you are to allow me the same profit, viz: 5 cents per fish over and above the regular price as paid by the canneries on Gray's Harbor. The quantity of Silversides that I will take from you is not to exceed one Silverside for every two dog salmon I deliver you.

"On dog salmon you are to take my entire catch at a price of ten cents (10c) per fish.

"Fish delivered by you to me to be taken from your wharf, and fish delivered by me to you to be taken from my wharf at Aberdeen.

"Owing to the fact that my business makes it a necessity for me to have fish at certain times during the season it will be necessary for you to deliver me fish when I call for them, provided always you have them on hand.

"Whatever surplus fish I may have and you may require will be delivered to you at prices as ruling above.

"This agreement to be in force for season of 1907 only.

"Yours very truly, Jas. W. Parks.

"Accepted and entered into as a contract this 14th day of August, 1907. S. Elmore & Co., by W. W. Ridehalgh."

"Astoria, Ore., August 14, 1907.

"Messrs. Elmore & Co.,

"Astoria, Oregon.

"Gentlemen:—Referring to the contract entered into this day by you and between ourselves, I hereby agree that as far as the dogs are concerned that in case of a heavy run of dog salmon on Gray's Harbor and your gear and the gear of any of the canneries you may be interested in is limited to a certain quantity of fish per boat that I will limit my boats to the same quantity and deliver only that quantity.

"Yours very truly, Jas. W. Parks."

On August 30, 1909, the respondent began the present action against the appellant, alleging a breach of the contract on the part of the appellant in that the appellant refused to take any part of his catch of dog salmon during the season of 1907, which amounted to 15,550 fish, and that in consequence he was obliged to throw the same overboard, save a certain quantity which he was able to dispose of at a price of $215.16.

The appellant answered the complaint, admitting the execution of the contract, but denied any breach thereof. He also set up three affirmative defenses; first, that the contract was executed and delivered in the state of Oregon, and was by the laws and decision of that state void and unenforcible, because contrary to the statute of frauds therein; second,

that the contract was void under the laws and decisions of the courts of the state of Oregon for want of mutuality, in that it contained no binding obligation on the part of the respondent; and third, that there had been a rescission of the contract on the part of the respondent. The affirmative allegations in the answer were put in issue by a reply, and a trial had before the court sitting without a jury, which resulted in a judgment in favor of the respondent for the sum of $1,422.54. This sum was reached by deducting the sum of $215.16 from the value of the fish at the contract price, and allowing interest on the remainder at the legal rate from December 25, 1907.

Taking up the assignments of error in the order in which the appellant presents them, the first to be noticed is the contention that the contract is void under the statute of frauds of the state of Oregon. The statute of that state provides that an agreement for the sale of personal property at a price of not less than fifty dollars is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent, or unless the buyer accept and receive some part of such personal property or pay at the time some part of the purchase money. (Bellinger and Cotton's Codes and Statutes of Oregon, § 797.) The reason given for the contention that the contract in question falls within this statute, is that it fails to express the consideration for the contract. But to comply with the rule of the statute, the consideration need not be stated in express terms. It is sufficient if from the whole writing it appears with reasonable clearness what the consideration was. It does so appear we think in the writing before us. It is evident that it was the purpose of the parties to agree upon a mutual course of dealing with reference to certain fish procured by each during the fishing season of 1907. To that end they made mutual promises which are set forth in the writing, and

the promise on the part of the one furnished a consideration for the promise on the part of the other.

"In those jurisdictions where it is necessary to state the consideration for the promise in the writing the consideration must clearly appear therefrom, but no special form is required for the statement; the consideration need not be expressed in so many words, but may be implied from the instrument. Thus if it appears from the writing that the promisee agrees to do or to forbear to do some act in consideration of the promise, the consideration is sufficiently expressed." 20 Cyc. 266.

Moreover, we think it may be questioned whether a contract of this nature is within the statute of frauds, as construed by the courts of Oregon. In *Hientz v. Burkhard*, 29 Ore. 55, 43 Pac. 866, 54 Am. St. 777, 31 L. R. A. 508, it was held that a contract concerning personal property which did not exist in specie at the time it was entered into, but was required to be thereafter manufactured and brought into being, was not within the statute. On similar principles it would seem that a contract to sell fish in the sea which must be caught before the contract could be fulfilled would fall within the same rule.

The contention that the contract is void for want of mutuality is based on the asserted fact that all of the binding obligations set forth in the contract are on the side of the appellant, while the respondent is at liberty to perform or not perform at his option. But we cannot think this a just deduction from the language of the contract. By a reference thereto it will be observed that the respondent obligated himself to do a number of things; for example, it is recited that his business is such that of necessity he must have fish at certain times and that it will be necessary for the appellant to deliver the fish when he calls for them, and that for such fish he agrees to pay three-fourths of a cent per pound over and above the cannery price for all salmon known as merchantable black salmon, and five cents per pound over and

above such price for all salmon known as silversides that may be delivered him under the contract. Furthermore, he agrees to limit his catch under certain circumstances should it be desired by the appellant, and he agrees to deliver to the appellant all surplus fish which he may have, and the appellant may require, at prices named. These are clearly promises that obligate the respondent, and being so, relieve the contract of lack of mutuality, even if it could otherwise be said that it was so lacking. It was not necessary that the respondent expressly promise to deliver to the appellant his entire catch of dog salmon in order to make this part of the obligation binding upon the appellant. This clause was but one of several in one complete contract, and to make each separate obligation in such a contract binding on the one party there need not be a special promise directed to that particular obligation on the part of the other. The case of *Corbitt & Macleay v. Salem Gaslight Co.*, 6 Ore. 405, 25 Am. Rep. 541, is relied upon to show that under the laws of Oregon contracts like the one at bar are void for want of mutuality. The contract in that case reads as follows:

"Portland, Oregon, December 16, 1875. This is to certify that the Salem Gaslight Company will purchase from Corbitt & Macleay, on arrival of ship from Sydney, Australia, due during the month of March, 1876, one hundred and fifty tons New Castle coal, delivered at Salem, at fourteen dollars per ton of two thousand two hundred and forty pounds. Payment, cash on delivery. Salem Gaslight Co., per Miles M. Miller, Sec'y."

The court held this contract void on two grounds: (1) That there was no mutuality of agreement or obligation; and, (2) that there was no consideration expressed in the writing. In the course of its opinion, however, it expressly distinguishes between writings containing mutual promises signed by both the parties and a unilateral writing such as the one there in question; saying that a promise made by one party is a good consideration for a promise made by the other,

where the promises are concurrent and obligatory upon both parties at the same time. It is manifest, we think, that the present contract falls within the exception to the rule therein stated, rather than within the rule itself.

Parol evidence was introduced by the respondent, over the objection of the appellant, intended to show the relation of the parties at the time the contract was entered into, for the purpose of explaining the meaning of the phrase, "my entire catch," used in the contract in the clause referring to the dog salmon. From this evidence it can be gathered that the appellant owned certain canneries located on Grays Harbor, and was engaged in the business of canning salmon; and that the respondent was engaged in business as a wholesale fish dealer at the same place; that while the respondent owned a few fishing boats which he leased to fishermen for a cash rent, and a fish trap located on a certain stream which he leased for a per centum of the net profits, he owned no fishing gear of any kind, nor did he personally engage in catching fish, through employees or otherwise; and that his method of procuring fish was to induce fisherman to sell to him by paying them fixed prices for their catches.

It appeared also that several different varieties of fish run into the harbor, each in its own season; that among these was a variety known as dog salmon, which was of very inferior quality, having no marketable value except through the canneries, and that these salmon usually ran with another variety known as silversides, which had a high market value and a ready sale. That fishermen while fishing for the silversides would catch in their gear quantities of dog salmon, and fish dealers, in order to procure the silversides, would have to purchase from them the catch of dog salmon; and that it was dog salmon procured in this manner by the respondent that was referred to in the contract by the words, "my entire catch"; that is, such dog salmon as he was compelled to receive in his business as a fish buyer. It appeared, moreover, that the appellant well understood the situation

at the time the contract was entered into; that both parties had been engaged in the fish business on Grays Harbor for a number of years, and that on the previous year they had operated under a similar contract.

The appellant, however, insists that this evidence was inadmissible, and ought not to be considered in determining the meaning of the contract, for the reason that the contract itself is not obscure, that the words "my entire catch" have in themselves a fixed definite meaning, and parol evidence is not admissible to vary their natural sense. And he argues that to permit this sort of evidence to control the contract is to permit the creation of a latent ambiguity by parol evidence, whereas, the rule only permits the explanation of a latent ambiguity by such evidence. But we cannot think the word "catch" has such a definite and fixed meaning as not to admit of explanation under any circumstances. On the contrary, it has a variety of meanings, especially when spoken with reference to fish. In common parlance, for example, when we speak of the catch of a fisherman, the phrase will have different meanings owing to the circumstances under which it is used; it may mean the fish caught by the fisherman individually, or it may mean those caught by him and his assistants, or it may mean those caught with his gear operated by third persons entirely. So when we speak of the catch of a cannery, the phrase may have still a different meaning; it may mean the fish brought to the cannery, without regard to the person by whom they were caught. So in determining the meaning of the phrase "my entire catch" in the case at bar, since it was capable of a variety of meanings, the court was at liberty to inquire into the situation of the parties and give it that meaning the circumstances made evident the parties themselves intended. Taking this evidence into consideration, notwithstanding it is earnestly questioned by the appellant's learned counsel, we have no doubt that it was the purpose of the parties to contract for all of the dog fish the respondent should be obliged to re-

ceive in the course of his business as a wholesale fish dealer, and that the court correctly so decided.

The next contention is that there was a rescission of the contract before the fishing season actually began. This contention is founded on a letter written by the respondent to the appellant in which he offers to rescind the contract if the appellant would consent thereto, but to the letter he received no reply, either in writing or otherwise. This did not amount to a rescission of the contract. On the contrary, it was not within the respondent's power to rescind it without the co-operation of the appellant, and since no reply was sent to his offer, he could not do otherwise than treat the contract as still in force, and act accordingly. It would have been a breach of the contract on his part to have acted otherwise.

It is next insisted that the recovery is too large, both with reference to the amount allowed for the fish destroyed and to the interest account. The respondent testified that he destroyed the dog salmon because there was no market for them, while the appellant insists that the evidence shows they could have been sold at a certain cannery for five cents each. But without entering into a review of the evidence on this point, we think the trial court correct in finding that the respondent used reasonable diligence in his efforts to dispose of the fish before destroying them. Aside from this, the fish were tendered to the appellant almost from day to day, with notice of the disposition that would have to be made of them if they were not called for by the appellant. If the appellant knew of a market he was morally obligated to point it out to the respondent, and failing in this, it would seem that he was not in the best possible position to claim lack of diligence on the part of the respondent.

The court allowed interest on the amount found due at the legal rate from a day in December, 1907, a period of some twenty months prior to the commencement of the action. The appellant insists that the court erred in so doing because, as he argues, interest on unliquidated damages cannot be re-

covered beyond the date of the commencement of the action. The courts are not in harmony on the question, but the general rule is that interest will be allowed on an unliquidated demand, the amount of which can be ascertained by mere computation, from the time the demand accrues. 22 Cyc. 1513. The demand in this case was composed of items thus ascertainable. The price per fish was agreed upon, and the amount recoverable depended upon the number of fish caught.

The remaining assignments need no special consideration. They relate chiefly to the rulings of the court made on the appellant's objections to the admission of evidence, and since the trial was had before the court sitting without a jury, and no question concerning costs is involved, the objections are not material.

The judgment is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8678. Department One. August 12, 1910.]

GEO. M. McDONALD *et al.*, *Appellants*, v. PETER VAN HOUTEN *et al.*, *Respondents*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY—TIME FOR FILING. A statement of facts not filed within the time limited by statute will be struck out on motion, and the judgment affirmed where the errors assigned cannot be reviewed without the aid of the statement.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered November 15, 1909, upon the verdict of a jury rendered in favor of the defendants. Appeal dismissed.

[1]Reported in 110 Pac. 428.

Walter & Bryant, for appellants.

Canton & Hensel, for respondents.

PER CURIAM.—Respondent moves to strike the statement of facts for the reason that it was not filed within the time limited by the statute. Judgment was entered on November 15, 1909. A statement of facts was filed in the office of the clerk of the superior court February 2, 1910, and settled by the court March 15, 1910. No order or stipulation extending the time for filing appears in the record, and the motion should be allowed. *State v. Aschenbrenner*, 45 Wash. 125, 87 Pac. 1118, and cases there cited. This conclusion requires an affirmance of the judgment, as none of the errors assigned can be reviewed without the aid of the evidence.

Judgment is affirmed.

[No. 8634. Department Two. August 15, 1910.]

THE CITY OF TACOMA, *Respondent*, v. L. N. HANSEN, *Appellant*.[1]

EMINENT DOMAIN—DAMAGES TO REMAINDER—EVIDENCE—SUFFICIENCY. In condemnation proceedings the verdict of the jury finding no damages to land not taken is supported by the evidence, and will not be disturbed on appeal, where one of the witnesses for the city testified that the northerly tract would not be damaged and that there might be about ten per cent damages to the southerly tract, and another witness testified that the southerly portion would be just as valuable now as it was before; especially where the jury viewed the premises and the trial judge sustained the verdict.

Appeal by defendant from a judgment of the superior court for Pierce county, Easterday, J., entered October 25, 1909, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

[1]Reported in 110 Pac. 426.

F. S. Blattner and *L. B. da Ponte*, for appellant.

T. L. Stiles, *F. R. Baker*, and *F. A. Latcham*, for respondent.

Crow, J.—The city of Tacoma instituted this action to condemn lands of the defendants L. N. Hansen and others for street purposes. The jury awarded Hansen $1,463 for lands taken, $550 for moving improvements, but found no damages to his land not taken. From the final judgment entered on their verdict, the defendant Hansen has appealed.

Appellant contends that the trial court erred in denying his motion for a new trial. The proposed street will pass through appellant's land, which is unplatted, in such a manner as to divide the portion not taken into tracts of unequal size. He claimed damages to the land not taken, and insists that, since the uncontradicted evidence was that the remaining parts of his land not taken were damaged, the verdict finding no damages should have been set aside. The jury inspected the premises, the land taken, that not taken, and the general location of the proposed street. Appellant in his brief asserts that two witnesses called by the city testified that, in their opinion, the land not taken was worth from $2,500 to $3,000 per acre, and would be damaged by the proposed improvement, to the extent of ten per cent of such value; while two witnesses called by him, testified to a value of $5,000 to $5,500 per acre, and a damage of from 50 to 60 per cent of such value; and that no other evidence on this issue was offered. He contends that the jury were not at liberty to substitute their arbitrary judgment or opinion for this sworn testimony of expert witnesses; that damages to the land not taken should have been found; that the verdict of no damages is not supported by the evidence, and that a new trial should have been granted.

The record does not support appellant's contention as to the effect and substance of what he claims to be the undisputed evidence. The strip taken will divide his land into two

parts, one located north, and the other south, of the proposed street. One of respondent's witnesses positively testified that the northerly tract would not be damaged, and suggested that there "might be about ten per cent damages on the lower tract." In referring to the southerly tract, one Smith, the other witness called by respondent, on cross-examination testified as follows:

"Q. Assuming that this southwesterly line of the land between the southerly line of the land and the southerly line of the road were but 75 feet, and the easterly point of that land were not, would you say that that land was not damaged by reason of the street going through? A. Considering the value of the improvement, I would say not damaged. Q. Do you mean to tell the jury that a piece of land approximately 75 feet to the southerly line of the property from the southerly line of the road, and approximately 160 feet in length with no width at the apex, would be just as valuable then as in its position now? Is that what you mean to convey to the jury? A. Exactly."

It will thus be observed that the testimony of one of these witnesses was to the effect that no damages would result to the northerly portion of the land not taken, while the testimony of the other was that no damage would result to the southerly portion not taken. In any event, the jury made a personal inspection of the property, its location, and surroundings, and such view was evidence to be considered, in connection with the testimony of the experts. It is impossible for us to determine what facts and conditions were disclosed by the view. After making the inspection and weighing all the evidence, the jury found that no damages would result to the land not taken by reason of the proposed improvement. The trial judge sustained their verdict, and under the rule announced in *In re Spring Street*, 41 Wash. 366, 83 Pac. 242, it should not be set aside by this court on appeal for want of sufficient evidence to sustain it. We are not announcing any rule to the effect that the jury are not required to consider, weigh, and pass upon the testimony of the ex-

pert witnesses, or that they may rest their verdict solely upon their knowledge obtained from a view of the premises. On the contrary, we hold that it was their duty to consider all the evidence, including the oral testimony as well as that afforded them by the view. This is what they undoubtedly did, under proper instructions given them by the trial judge, to which no exceptions have been taken. Referring to a verdict in a condemnation proceeding, of which complaint was made, this court, in *In re Mercer Street*, 55 Wash. 116, 104 Pac. 133, said:

"The question presented for our consideration is, not what our own conclusion from the evidence would be, but whether the conclusions of the jury as expressed in their verdict must stand. An appellate court should hesitate before setting aside the verdict of a jury in a condemnation case, and it will only make such order when it clearly appears that the verdict is unjust and unsupported by any competent evidence. 7 Ency. Plead. & Prac., 593-4; *In re Spring Street*, 41 Wash. 366, 83 Pac. 242; *Conness v. Indiana etc. R. Co.*, 193 Ill. 464, 62 N. E. 221; *Fort Street Union Depot Co. v. Jones*, 83 Mich. 415, 47 N. W. 349; *Hartman v. Reading & P. R. Co.* (Pa.), 13 Atl. 774. On a pure question of fact, such as is here presented, it is evident that the jurors who heard the witnesses and examined the property and were familiar with the situation and all of its surroundings, are much better qualified to estimate the damages to be awarded than this court would possibly be, and the right to fix such damages being exclusively within the province of the jury, their verdict should not be disturbed except for the want of competent evidence to support it."

Taking into consideration all the evidence, including the view of the premises, which afforded the jury an opportunity for understanding the exact situation and estimating any probable damages which might result from the improvement, we cannot say that their verdict of no damages to the property not taken should be set aside for the want of sufficient evidence to support it.

Appellant further insists that his motion for a new trial should have been sustained, for the reason that the verdict of

the jury, allowing him only $1,463 for the land taken, is inadequate. Considering the amount of the land taken and the valuation placed thereon by the various witnesses, the award seems to be well within the evidence, and cannot be disturbed. The judgment is affirmed.

Rudkin, C. J., Parker, Dunbar, and Mount, JJ., concur.

[No. 8889. Department Two. August 15, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Everett & Cherry Valley Traction Company, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al.*, *Respondents.*[1]

EMINENT DOMAIN—PROPERTY DEVOTED TO PUBLIC USE—APPEAL—REVIEW. One railroad company may condemn a portion of the right of way of another where there is a necessity therefor and the same can be taken without material detriment or injury to the other company; and if a public necessity exists and each road will have a right of way sufficient for all necessary public use, findings on conflicting evidence in favor of the condemnation will not be disturbed on appeal.

Certiorari to review an order of the superior court for King county, Kauffman, J., entered April 20, 1910, adjudging a public use and necessity for the condemnation of a railroad right of way. Affirmed.

F. V. Brown and *Frederic G. Dorety*, for relator.

H. H. Field and *Geo. W. Korte*, for respondents.

Crow, J.—The Chicago, Milwaukee and Puget Sound Railway Company, a corporation, instituted proceedings against Everett & Cherry Valley Traction Company, a corporation, in the superior court of King county, to condemn for a public use certain land which is a portion of the defendant's right of way. The trial court held that a public

[1]Reported in 110 Pac. 428.

necessity existed, and that the taking would not result in material injury to the defendant. The defendant thereupon applied to this court for a writ of certiorari, and the order adjudging the public use is now before us for review.

The respondent Chicago, Milwaukee and Puget Sound Railway Company, by proper procedure, located its proposed right of way between the right of way of the relator, Everett & Cherry Valley Traction Company, and the Snoqualmie river. It now seeks to condemn portions of relator's right of way at three points, the tracts being designated as conflicts one, two, and three. The relator's most serious objections are to conflict two. If respondent's right to condemn it is sustained, its right to one and three must also be sustained. At conflict two, respondent proposes to take two tracts, to one of which only, located in lot 4, Sec. 13, Tp. 26 N., R. 6 E., W. M., is any serious objection interposed. It here seeks to condemn from relator's right of way a strip of land adjoining the river, the same being all of lot 4 west of a line 50 feet from the center of relator's main track. This will leave the relator a right of way extending 50 feet west, and 120 feet east, of its center line. It acquired the land by purchase, and now contends that the portion so sought to be taken is devoted to a prior public use; that it is needed by relator for a passing track, an industrial track, a storage track, a loading platform, a storage yard, and stock yards, without which it cannot successfully prosecute its contemplated business as a public service corporation; that its taking by respondent will be a material detriment to the relator, and that it is not necessary for any public use to the respondent road.

This court has repeatedly held that one public service corporation may condemn and take a portion of the right of way or property of another when there is a necessity therefor, and when the land sought to be condemned may be taken without material detriment or injury to the claimant corporation. *Samish River Boom Co. v. Union Boom Co.*, 32

Wash. 586, 73 Pac. 670; *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663; *State ex rel. Milwaukee Term. R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175. In *State ex rel. Columbia Valley R. Co. v. Superior Court*, 45 Wash. 316, 88 Pac. 332, we said:

"It is contended that the premises in question are not subject to condemnation by the Portland & Seattle Railway Company, because such premises were acquired by the Columbia Valley Railroad Company for railway purposes. Conceding that the Columbia Valley Railroad Company acquired the premises in good faith for railroad purposes, and intends within a reasonable time to devote the lands to such use by constructing a railroad thereon, it has been held that one railroad company may appropriate the lands of another in this state where there is necessity therefor, and where the lands sought can be taken without material detriment to the established road. *State ex rel. Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *Seattle etc. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491, 69 Pac. 1107 [92 Am. St. 907]; *Seattle etc. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217."

The only question, then, for our consideration is whether the evidence shows that both roads can adjust themselves to the conditions that will result if the condemnation is permitted, and that they will be able to perform their several functions and duties as public service corporations. The relator contends that the evidence of its witnesses, to the effect that it will be impossible for it to then prosecute its business without material detriment, is not disputed, contradicted, or rebutted. This contention seems to be based upon the assumption that testimony of one expert witness can only be rebutted by that of another. Relator seems to lose sight of the fact that the testimony of its expert witnesses was materially weakened on cross-examination, and also of the further fact that the respondent introduced its expert evidence in its opening and when presenting its case. Our view

is that the evidence was conflicting. The trial court resolved all issues of fact in favor of respondent, and in so doing necessarily found that a public necessity existed, and that the taking of the portion of the right of way here sought to be condemned would not result in any material detriment to the relator. A repetition and discussion of the evidence would serve no useful purpose. We have carefully examined the entire record and conclude therefrom that the findings of the trial judge must be sustained, that a public necessity exists, that the relator and respondents can readily adjust themselves without material detriment to the conditions that will obtain after the condemnation, and that they will each have a right of way amply sufficient for all necessary public uses.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8768. Department Two. August 17, 1910.]

JONES-THOMPSON INVESTMENT COMPANY, *Appellant*, v. CASCADE STEEL FOUNDRY COMPANY, *Respondent*.[1]

CORPORATIONS— STOCK — SUBSCRIPTION—FRAUD—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show fraud in securing a subscription to the stock of a corporation to be paid for by the conveyance of land, upon representations that all the stock was subscribed and that a plant for the manufacture of steel castings would be constructed on the land, where it merely appears that the work of constructing the steel plant was suspended on account of a financial depression and not abandoned, and all the stock was subscribed, although part of the subscribers were probably not financially responsible, there being however no such want of ability to pay and knowledge by the corporation as to support a charge of fraud in procuring the subscriptions; especially where the plaintiff consummated the land deal by a deed without conditions after suspension of the work of construction of the plant.

DEEDS—FORFEITURE—BREACH OF CONDITIONS—MERGER OF PRELIMINARY MATTERS. There can be no forfeiture of land conveyed by absolute deed without conditions, pursuant to a contract to erect there-

[1]Reported in 110 Pac. 417.

on a manufacturing plant, where the only condition precedent to the making of the conveyance was the expenditure of $5,000 in preparing the ground, which was fulfilled, and the contract fixed no time for the completion of the plant, the construction of which had simply been suspended and not abandoned; since the preliminary matters were merged in the deed, which could not be set aside for breach of condition not expressed in it.

Appeal from a judgment of the superior court for King county, Main, J., entered November 6, 1909, upon findings in favor of the defendant, in an action for rescission on the ground of fraud. Affirmed.

Douglas, Lane & Douglas, for appellant.

Kerr & McCord, for respondent.

PARKER, J.—This action was commenced by the plaintiff to procure the cancellation of a subscription made by it to the capital stock of the defendant, upon the organization of that corporation, and to set aside a conveyance of land made by plaintiff to defendant in payment of the stock subscribed for. A trial before the court resulted in a judgment denying the relief prayed for by the plaintiff and a dismissal of the action, from which it has appealed to this court.

Articles of incorporation were executed, and filed in the office of the secretary of state and in the office of the auditor of King county, early in August, 1907, creating the respondent a corporation under the laws of this state. About the same time, all of the capital stock of the respondent was subscribed for, in the total sum of $200,000, the appellant subscribing for $6,000 thereof, by a writing as follows:

"The undersigned, Jones-Thompson Investment Company, a domestic corporation, hereby subscribes for six thousand shares of the pár value of one dollar each, and of the total par value of six thousand dollars, of the capital stock of the Cascade Steel Foundry Company, a corporation organized under the laws of the state of Washington, with a total capital stock of two hundred thousand dollars divided into two hundred thousand shares of the par value of one dollar each.

"The undersigned corporation agrees to pay the amount of said subscription, however, only by the execution and delivery to the Cascade Steel Foundry Company of a good and sufficient warranty deed for a tract of ten acres situated in section 18, township 23, north, range 5, east, King county, Washington, more particularly described in that certain contract of even date between the parties, and it is understood that this subscription is a part of said agreement, which would not have been made had this subscription not been executed.

"The undersigned agrees to accept the shares of stock hereby subscribed in payment of the sum of six thousand dollars, required by paragraph 2 of said contract, but said stock shall be fully paid and non-assessable, and shall be so issued by the corporation in payment for the ten acres of land described in said contract, and will be accepted by the undersigned corporation in full payment for said land.

"No obligation shall attach to this subscription, however, unless the said Cascade Steel Foundry Company shall first proceed to construct on said property a plant for the manufacture of steel casting as provided in said contract, and shall expend the sum of five thousand dollars upon said ground in labor and improvements preparatory to the construction of said plant.

"Dated at Seattle, Washington, this 10th day of August, 1907. Jones-Thompson Investment Company, By Fred R. Thompson, President.

"Attest: A. A. Jones, Secretary."

At the same time the parties entered into a contract for the payment of the stock subscribed for by appellant, the provisions of which contract, so far as material to this controversy, are as follows:

"This contract, made at Seattle, Washington, this 10th day of August, A. D. 1907, between Jones-Thompson Investment Company, a domestic corporation, as first party, and Cascade Steel Foundry Company, a domestic corporation, as second party,

"Witnesseth: That in consideration of the premises, and of the sum of one thousand dollars now paid to the first party by the second party and hereby acknowledged, the parties hereto agree with each other as follows:

"(1) The first party agrees to sell and convey to the second party, who agrees to purchase from first party upon the following terms and conditions, a tract of ten acres, situated . . . (Here follows description of land.)

"(2) The purchase price is the sum of six hundred dollars per acre, or the total sum of six thousand dollars, and it is understood that the second party will erect on said premises a plant for the manufacture of steel castings, which will employ one hundred men or more, and whenever the second party shall have made improvements of the value of five thousand dollars in the grading and preparation of such tract and the construction of foundations, building, etc., which must be on or before November 1st, 1907, and shall then tender to the first party the purchase price, the first party will make, execute, acknowledge and deliver to second party its good and sufficient warranty deed conveying without special covenants all the tract first herein described free from all incumbrances."

Then follows provisions in the nature of an option to purchase another tract, with which we are not concerned. Thereafter respondent made improvements upon the land of the value of more than $5,000 by grading, construction of foundations, etc., entitling it to a deed under the terms of the contract, upon payment of the purchase price. Thereafter, about November 27, 1907, respondent caused to be issued and delivered to appellant a certificate in usual form, for $6,000 of the capital stock of respondent; and thereafter, on December 9, 1907, appellant executed and delivered to respondent a deed for the land, in compliance with the terms of the stock subscription and land contracts. This deed was absolute in form, without any conditions or restrictions whatever touching the matters here involved. So far we regard the facts as being established by the record beyond controversy. Indeed they are not seriously disputed, save as to the capital stock of respondent being all subscribed for. This disputed fact we will notice later.

Before proceeding further it will be well to briefly state the grounds upon which appellant claims relief. The sub-

stance of these, we gather from the complaint, are that respondent, through its president, made certain false representations to the officers of appellant, which induced appellant to enter into the contracts above quoted from and give the conveyance in consummation thereof—to the effect that the capital stock of respondent was all fully and actually subscribed for upon the making of appellant's subscription, that the means necessary for the construction and putting in operation of a manufacturing plant of the nature mentioned in the contracts were available, and that respondent was intending to proceed with the construction of, and put in operation, such a plant upon the land. These representations are alleged to have been knowingly falsely made, and made for the purpose of inducing appellant to enter into the contracts and give the deed for the land. It is further alleged, in substance, that after the issuing of stock to appellant and the conveyance of the land by it to the respondent, the work of constructing the plant was abandoned, and no further calls made upon the stock subscribers to pay their subscriptions to furnish means for proceeding with the construction.

Respondent by its answer, in substance, denies the making of false representations, as alleged by plaintiff; and alleges, that its capital stock was fully and legally subscribed for upon the making of appellant's subscription; that respondent entered upon the land in absolute good faith with full intent and purpose of erecting its plant thereon; that about November 1, 1907, owing to the business depression then prevailing and which had prevailed since about October 1, 1907, the conditions became such that the plant, if completed, could not be operated at a profit, and it was therefore deemed advisable to defer further construction, and accordingly the board of trustees resolved to and did defer construction of the plant until such time as the industrial conditions of the country would warrant proceeding therewith, but that it never has been the intention of respondent

to abandon the enterprise; that, when appellant gave to the respondent a deed for the land in pursuance of the contract, appellant did so with full knowledge that further construction of the plant had been deferred to some future time. The foregoing we think is a sufficient statement of the issues to show the main contentions of the parties, though both the complaint and answer alleged many other minor facts.

While many of the allegations in the pleadings, and a considerable part of the evidence, relate to matters occurring after the issuing of the stock certificate and making of the conveyance of the land in pursuance of the contracts, it is plain that the fraud relied upon to avoid the transaction must have occurred prior to the conveyance, to be available to appellant as grounds of relief. We have stated that the stock was all subscribed for. While there is no substantial dispute as to the stock being subscribed for in form, it is contended by appellant's counsel that the evidence shows it was never all subscribed for in good faith with the intention, on the part of the respondent and all the subscribers, of rendering all the subscribers liable for the payment of their subscription, and that $100,000 of the subscriptions were made with the understanding that payment therefor would not be required. This alleged understanding between respondent and certain of its stock subscribers appellant claims to have been ignorant of until long after making conveyance of its land in payment of its stock.

The evidence shows that the respondent contemplated the construction of a plant in the first instance which would cost in the neighborhood of $75,000, and to that end contemplated the issuing of only $100,000 of its stock for the time being, the balance to be paid for and issued in the future to furnish capital for the further development of the enterprise. To this extent, it may be fairly drawn from the evidence that it was understood that payment for this additional $100,000 subscription would not be called for to aid in the construction of the plant originally contemplated, but would be later

called for to aid in future development. We do not think the evidence warrants the conclusion that any of the subscribers were relieved from legal liability to pay for their stock subscriptions. The subscriptions, except that of appellant, were made in writing, unconditionally except as to the times of paying therefor, which were as follows: "Ten per cent in cash upon demand; 50 per cent upon demand on or after October 15, 1907; 20 per cent upon demand on or after December 1, 1907; and the remaining 20 per cent upon demand on or after January 1, 1908." The first ten per cent was called for, and a considerable part thereof paid, before the suspension of the work on the plant, though no calls beyond the first ten per cent have been made.

There was evidence, which we think sufficient, to warrant the conclusion that this contemplated plan of starting the enterprise was known to appellant before it accepted its certificate of stock and conveyed the land to respondent. It is also contended that the evidence shows that several of the subscribers were wholly irresponsible financially and unable to pay their subscriptions, and that such facts were known to the officers of the respondent who procured such subscription. The record does contain some evidence tending to show that some of the subscribers would not be able to promptly respond to an assessment call. But we do not think that the evidence is such as to warrant our holding that there was such a want of ability to pay on the part of the subscribers, and knowledge thereof upon the part of the respondent's officers, as will support the charge of fraud in the procuring of such subscriptions. The work upon the plant was suspended before appellant made conveyance of its land to respondent. This suspension, it was claimed by respondent, was on account of the financial and business depression prevailing throughout the country generally, which commenced after the organization of respondent and the subscription was made to all of its stock. The fact of this suspension and the reasons claimed by the officers of re-

spondent for suspending the work, we think the evidence shows, was known to appellant before it made the conveyance and received its stock certificate. We have carefully read all of the several hundred pages of the testimony and exhibits, and without attempting to review the same further in detail, which we think would serve no useful purpose, we conclude that, under all the circumstances shown, there is not such a showing of false representation and fraud upon the part of respondent and its officers, prior to the conveyance of the land made by appellant in compliance with the contracts, as to warrant the granting of the relief prayed for.

We have noticed the fact that a considerable part of the evidence relates to matters occurring after the conveyance of the land, which constituted the final execution of the prior contracts between the parties. We regard this evidence material here only for the purpose of throwing light upon the question of the good faith of respondent and its officers in the inauguration and carrying on of the enterprise up to the time of the conveyance. Of course what happened after that could not have influenced appellant to enter into the contract or make the conveyance. There is evidence tending to show that the trustees have decided to further delay the construction of the plant and not call for further payments upon stock subscription at the present time, but we do not think the evidence shows an intention to abandon the enterprise. The evidence in the record along these lines we think does not materially support appellant's claim of false representation and fraud on the part of respondent prior to the conveyance of the land.

Learned counsel for appellant seemed to make some claim to relief based upon the theory that respondent has forfeited its right to the land by having failed to fulfill conditions upon which the grant was made. In view of the form of the conveyance, we are unable to see how appellant's claim can be sustained upon any such theory. There being

no conditions in the conveyance the failure to perform which would work a forfeiture of respondent's title, the question of forfeiture by breach of conditions we think can in no event be in the case. It is true, the original contract for the conveyance contemplated the erection of the plant on the land, but even that contract fixed no time for the completion of the plant, nor did it in any manner provide that the completion of the plant should be a condition precedent to the respondent being entitled to the deed. The only condition in that respect was the making of $5,000 worth of improvements on the land and paying the purchase price in the form of stock, which we have seen was done. All these preliminary matters were merged in the conveyance, which was the final consummation of the deal, and the question of forfeiture of respondent's title by reason of breach of conditions must be determined by the terms of the final conveyance, which we have seen contained no conditions whatever which could work a forfeiture. 13 Cyc. 616. Of course the question of fraud in procuring the contract and conveyance is another matter, but this we have resolved in respondent's favor.

We find no prejudicial error in the rulings of the learned trial court upon the admission and rejection of evidence, as claimed. In any event, such rulings would not change the conclusions we have reached.

The judgment is affirmed.

RUDKIN, C. J., CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 8954. *En Banc.* August 18, 1910.]

L. F. BOOTHE, *Appellant*, v. SUMMIT COAL MINING COMPANY *et al.*, *Respondents*.[1]

APPEAL — APPEALABLE ORDERS — DIRECTING RECEIVER'S SALE. An order directing a receiver's sale of all the assets of a corporation is appealable as a final order in the proceeding.

APPEAL—SUPERSEDEAS—RECEIVER'S SALE—MANDAMUS. Mandamus lies to compel the superior court to fix the amount of the supersedeas bond upon appeal from an order directing a receiver's sale of the assets of a corporation.

Application for a writ of mandamus, filed in the supreme court, July 14, 1910, to compel the superior court for Kittitas county, Kauffman, J., to fix the amount of a supersedeas bond on appeal from an order directing a receiver's sale. Granted.

Kerr & McCord, for appellant.

John L. Corrigan, for respondent Linden.

PER CURIAM.—This cause was formerly before this court on an appeal from a judgment of dismissal. *Boothe v. Summit Coal Min. Co.*, 55 Wash. 167, 104 Pac. 207. After a hearing, the judgment was reversed and the cause remanded, instructing the trial court to appoint a receiver for the corporation, to take an accounting between the stockholders thereof, to require the defendant R. J. Linden to return to the corporation all money received by him as salary in excess of $125 per month, and to wind up the business of the corporation and dissolve it. After the remand of the case, the court appointed a receiver, who took possession of the corporate property. Thereafter the receiver made a report to the court, whereupon an order was made directing all parties to the action to appear on a date named

[1]Reported in 110 Pac. 536.

and show cause, if any they had, why an order of sale of the corporate property should not be made. On the day appointed, the appellant appeared and filed objections to the sale, on which a hearing was had, which resulted in an order overruling the objections and directing a sale of all of the assets of the corporation, consisting of both real and personal property. The appellant thereupon gave notice of appeal to this court from the order of sale, and applied to the court for an order fixing a supersedeas bond, and for a stay of proceedings brought pending the appeal. The application was denied, and the appellant brought the present proceedings in this court asking for a writ of mandate to compel the allowance of a supersedeas, and the fixing of a supersedeas bond.

The reason suggested for denying the application is that the order sought to be appealed from is not in itself an appealable order, but must be reviewed, if reviewed at all, by an appeal from the order confirming the sale of the property. But the question we think is no longer an open one in this court. In *State ex rel. Newland v. Superior Court*, 16 Wash. 444, 47 Pac. 965, we denied an application for a writ of prohibition to restrain a receiver's sale, ordered by the court, on the express ground that the order directing the sale was so far final as to permit an appeal therefrom, holding expressly that the remedy to review such an order was by appeal. As further touching the question, although perhaps not directly in point, see the cases from this court collected in *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113, more particularly on pages 260 and 261 of the opinion. On the other hand we have expressly held that the only question that can be reviewed under our statute on an appeal from an order of confirmation is the regularity of the proceedings concerning the sale. *Krutz v. Batts*, 18 Wash. 460, 51 Pac. 1054; *Harding v. Atlantic Trust Co.*, 26 Wash. 536, 67 Pac. 222; *Lewis v. Mauerman*, 35 Wash. 156, 76 Pac. 737.

It is true, we held in the later cases of *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, 111 Am. St. 1022, and *Stark Brothers v. Royce*, 44 Wash. 287, 87 Pac. 340, that an order of confirmation could be successfully resisted where it was made to appear that the order of sale on which it is based was void—this, on the principle that a void order or judgment may be questioned at any time; but the cases first cited still stand as authority to the effect that a valid or voidable order of sale cannot be questioned on an appeal from the order of confirmation.

Since the order appealed from is an appealable order, the appellant was entitled to a supersedeas. The writ will therefore be granted.

[No. 8098. Department Two. August 20, 1910.]

S. CAMPBELL *et al.*, *Appellants*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

BOUNDARIES—LOCATION—MONUMENTS—COURSES AND DISTANCES—EVIDENCE—SUFFICIENCY. Where surveyors testified that some years previous by actual surveys they found the initial corner stake of a platted addition and other original stakes at corners of lots on plaintiff's land, showing full sized lots forty feet wide in accordance with the plat, and corresponding with the present street lines, the monuments found govern and control a call in the plat giving courses and distances from a certain government corner as the location of the initial corner of the plat, which would locate the initial corner in the street and add 13.9 feet to plaintiff's lots.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 6, 1909, upon findings in favor of the defendants, in an action for an injunction. Affirmed.

Byers & Byers, for appellants.

Scott Calhoun and *H. D. Hughes*, for respondents.

[1]Reported in 110 Pac. 546.

Crow, J.—Action by S. E. Campbell and Samuel Campbell, her husband, against the city of Seattle, its street commissioner, and board of public works, to enjoin the defendants from interfering with a building erected by plaintiffs, and which the defendants claim is on Third Avenue Northwest, a public street. From a decree in defendants' favor, the plaintiffs have appealed.

Appellants own lots 14, 15, 16, and 17, in block 1, of Ross' addition to the city of Seattle. The only question before us is the correct location of the east line of lots 15 and 16, conceded to be the west line of Third Avenue Northwest. The official plat shows the appellants' lots to be each one hundred and twenty feet north and south by forty feet east and west. If appellants' contention is sustained, each of their easterly lots 15 and 16, will be 53.9 feet in width, and the street will be 13.9 feet narrower than claimed by respondents. The trial court found the true line to be as contended by respondents. This finding secures to appellants the entire area in their lots as shown by the plat, is supported by the clear preponderance of the evidence, and must be sustained.

In support of their contention, appellants rely upon a recital in the dedication attached to the official plat of Ross' addition, made and filed in 1888, to the effect that the northeast corner of block 1, the initial point of the addition, is 1,347 feet south, and 1,350 feet west, of a certain government corner. They introduced evidence to show that such a measurement would so locate their east line as to encroach 13.9 feet upon the street now claimed by the city. Respondents, however, produced a number of competent surveyors who testified that, as a result of actual surveys of the addition made by them in 1893 and 1895, they found the initial corner stake of the addition at the northeast corner of block 1, the same being the northeast corner of lot 15 now owned by appellants; that they also found other original stakes at corners of appellants' lots, and of other lots in the addition; that the positions of such stakes correspond with the city's

present contention and secure to the appellants full sized lots of forty by one hundred and twenty feet, as shown on the plat; that two of appellants' lots had been previously enclosed and fenced in accordance with the corners and lines fixed by these original stakes, and that one of appellants' grantors had caused a survey to be made of two of the lots, with the result that they were shown to be only forty feet in width, and that such survey fixed the original initial corner in accordance with respondents' present contention. This, with other evidence which it is not necessary to state, shows that the lots as platted, surveyed, and staked upon the ground, and afterwards enclosed, improved, and conveyed to appellants, are only forty feet wide, and that they do not include the strip in dispute, which the city claims as a part of the street.

Appellants purchased their lots in accordance with, and by the description stated in the plat. In the event of a conflict, it seems to be a well established rule that courses and distances must be subordinated to original stakes and surveys showing the location and dimensions of lots.

In *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084, this court said:

"Practical or agreed location of a boundary line may result from long acquiescence in its location, or when drawn and acted upon by the parties, as where valuable improvements are placed with reference to it and before it is denied by either party. 5 Cyc. 930 *et seq.* In *Flynn v. Glenny*, 51 Mich. 580, 17 N. W. 65, it was held that purchasers of town lots have a right to locate their lot lines according to the stakes set by the plattor of the lots, and that no subsequent survey can unsettle such lines; Mr. Justice Cooley saying: 'The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case,

they must govern, notwithstanding any errors in locating them.' "

The evidence supports the findings of the trial judge. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8822. Department Two. August 20, 1910.]

EMMA E. PIERCE, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.[1]

MUNICIPAL CORPORATIONS — STREETS — NEGLIGENCE — UNGUARDED DITCH. The negligence of a city in leaving an unprotected ditch in a street, and the contributory negligence of the plaintiff, is for the jury, where it appears that the plaintiff, in order to avoid dangers in a street that was being improved, walked diagonally across an intersecting street to cross vacant lots to her home, and fell into an unguarded ditch of which she had no knowledge, and that the night was dark and the place unlighted.

MUNICIPAL CORPORATIONS — ACTIONS — NOTICE OF CLAIM — SUBSEQUENT RESULTS. The requirement of a city charter that claims for personal injuries shall be filed within thirty days and shall state the nature and extent of the injuries and the amount of the claim is for the purpose of giving timely notice, and does not preclude a recovery for additional injurious results that have developed since the claim was filed and were not known or anticipated at the time.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for $8,000 is not excessive where the injury to a pedestrian through a fall into a ditch in a street resulted in the fracture of a knee cap, rupture of the knee capsule and other injuries, crippling plaintiff for life, and bringing on traumatic neurasthenia.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December, 17, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a pedestrian on a defective street. Affirmed.

[1]Reported in 110 Pac. 537.

F. B. Morrill, E. O. Connor, and *George A. Lee*, for appellant.

Harris Baldwin, for respondent.

Crow, J.—Cannon and Belt streets, running north and south, are intersected at right angles by Knox avenue, running east and west, in the city of Spokane. An electric car line is operated on Cannon street, which is one block east of and parallel with Belt street. On May 24, 1909, the city of Spokane was improving Knox avenue by grading, curbing and sidewalking. About 6:30 o'clock in the evening of May 24th, 1909, the plaintiff, Emma E. Pierce, who lived on Belt street a short distance north of Knox avenue, walked from her home diagonally across Knox avenue to take a south bound Cannon street car. She then noticed that Knox avenue between Cannon and Belt streets was in an unsafe condition by reason of improvements then in progress. About 9:30 p. m. she returned on a north bound car, alighted at the northeast corner of Cannon and Knox, and to avoid walking on Knox avenue, turned in a northwesterly direction across Cannon street so as to pass over some vacant lots to her home. As she was crossing the curb line on the west side of Cannon street and about 25 feet north of the north curb line of Knox avenue, she fell into an unguarded ditch, struck a cement curbing and was seriously injured. After filing a verified claim, which was rejected, she instituted this action against the city for damages, and the defendant has appealed from a final judgment entered in her favor.

The appellant contends that the trial court erred in denying its motions for a directed verdict, and for judgment notwithstanding the verdict. Respondent and her witnesses testified, that no barricade guarded the ditch; that although signal lights were placed on Knox avenue, none was placed on Cannon street; that the nearest light on Knox was 25 or 30 feet distant from the point where she fell; that the night was dark; that she did not know of the ditch on Cannon

street; that she went north of Knox avenue to avoid its dangers; and that in so doing she fell into the ditch on Cannon street, without knowledge or warning of its existence. Appellant contends that the respondent was guilty of contributory negligence, and that the city was not negligent. On motion for a directed verdict in favor of the defendant the evidence must be considered most favorably to the plaintiff. The record before us contains sufficient evidence introduced on respondent's behalf to sustain a verdict in her favor. There was ample proof of negligence on the part of appellant, and we cannot hold the respondent guilty of contributory negligence as a matter of law.

The accident occurred on May 24, 1909. The Spokane city charter provides that

"All claims for damages for personal injuries . . . alleged to have been sustained by reason of the negligence of the city, or any officer, agent, servant or employe thereof, must be presented to the city council within one month after any such injuries shall have been received, in the manner hereinafter in this section provided . . . All claims for injuries to person or property, and all notices of such claims herein required, shall be in writing and shall state the time when and the place where such injuries were received and must also state the cause, nature and extent of the same, the amount of damage sustained thereby and the amount for which the claimant will settle the same. . . .; and the refusal or omission to present such claim and give notice, where notice is required, shall be taken to be, and shall be, a waiver of any and all damages on account of such injuries, and shall be a bar to any suit or action against the city to recover the same, or any part thereof; . . ." Spokane City Charter, § 220, subd. 1.

On June 19, 1909, the respondent filed with the city her verified claim for $5,000 damages for personal injuries, $350 for doctor bills, and $120 for hospital fees, being $5,470 in all, and stated the nature and extent of her injuries in the following language:

"The nature and extent of said personal injuries are that

by reason of the said Emma E. Pierce falling, as aforesaid, into the said ditch or trench the patella or knee cap of her left knee was fractured, the capsule of the joint of her left knee was ruptured, the ligaments attached to her left knee were strained and sprained and the tissues surrounding the left knee were bruised whereby and by reason whereof she endured severe nervous shock and was caused to suffer and did suffer long and great and grevious physical pain, and will continue to suffer pain for the rest of her life, and her power of locomotion has been impaired."

This claim was rejected by the city. The respondent in her complaint alleged, and on the trial offered evidence to show, that no indication of any further injuries than those stated in her verified claim appeared, either to herself or her physician, before the middle of July, 1909; but that in July, and thereafter, other injurious results of the accident developed and that they continually increased, and were increasing at the date of the trial, which occurred in December, 1909. The nature and extent of these additional injuries which were alleged and proven need not be here stated. In her complaint the respondent asked damages for the injuries originally mentioned in her verified claim, and for the injuries which thereafter appeared, in the total sum of $18,358. Over appellant's objection she was permitted to introduce evidence in support of these additional claims, and a verdict for $8,000 was returned in her favor, which exceeded her original verified claim by $2,530.

The appellant by numerous assignments of error, predicated upon objections to evidence admitted, upon the denial of its motion to strike the same, and upon its exceptions to instructions given and refused, now insists that in her pleadings and proof the respondent should have been restricted to her verified statement as to the extent of her injuries, and also as to the amount of damages therein claimed, and that the trial court erred in admitting evidence of additional injuries and damages and in permitting the same to be considered by the jury. The evidence admitted was sufficient to

sustain the respondent's allegation that the additional injuries did result, and that they first appeared more than thirty days after the accident, when the time for filing her verified claim had expired. There is no contention of bad faith on her part, or that she attempted to deceive the city when presenting her claim. In *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, in commenting on this section of the Spokane charter, we said:

"We think a reasonable compliance with this provision is all that would be required, and that it is the duty of a claimant, under this charter provision, to state as near as he can the amount of his damages; and, no doubt, if it should afterwards eventuate that he had been mistaken in that regard, he would be allowed by the court to make such showing. We think that, thus liberally treated, the statute, as to time, is not an unreasonable one; but that, under the provisions of the complaint, considered with reference to the demurrer, a sufficient excuse was pleaded, and that the instructions of the court were warranted."

Although the question raised in the *Born* case pertained to the time for filing a verified claim, rather than to the amount of damages demanded, the above statement announces a rule that should be here applied. The manifest purpose of the charter was to afford the city an early opportunity to examine the locality where the accident occurred, to ascertain the nature of the alleged defect in the street or sidewalk, and learn, as far as known, the character and extent of the injuries sustained by the claimant, so that it may avoid litigation and costs by settling the claim, if meritorious; or on the other hand, if on investigation the claim appeared to be without merit, then to afford the city an opportunity for preparing its defense and procuring evidence while the same may be obtained. The single circumstance that the claimant, not fully realizing the extent of her injuries, demands less, or offers to settle for less than, as shown by future developments, she should recover, will not preclude her from main-

taining a suit for the damages actually sustained, and subsequently ascertained.

In *Mackay v. Salt Lake City*, 29 Utah 247, 81 Pac. 81, in passing upon a statute similar to the charter provision now under consideration, the court said:

"The record shows that the claim in this case was filed with the city recorder six weeks after plaintiff was injured, and it was more than five months thereafter when it was rejected and disallowed by the city. In cases liks this it might often happen that the full extent of the injuries received could not be accurately determined within the time in which the claims must be filed as required by law, and it might develop long afterwards that the injuries were of a much more serious character than they appeared to be when received. So, in this case, it appears from the record that the injuries to plaintiff's leg and back are permanent in character. and which, at the time he filed his claim, he might well have believed were only temporary, and from which he would, in the course of time, recover. In the case of *Noble v. Portsmouth*, 67 N. H. 183, 30 Atl. 419, this same question was involved, and the court, in the course of the opinion, says: 'But if the town declines to settle there is no reason why the plaintiff, who has innocently underestimated his claim, should not recover actual damages. His injury, which at first may seem slight, may prove to be serious. Within the brief period for filing the statement the nature and extent of his injuries may not have become developed. Time may demonstrate he was honestly mistaken, and the law does not visit upon him consequences which result from no fault of his.' "

See, also, *Terryll v. Faribault*, 84 Minn. 341, 87 N. W. 917; *Robin v. Bartlett*, 64 N. H. 426, 13 Atl. 645; *City of Wyandotte v. White*, 13 Kan. 191; *Reed v. Mayor etc. of New York*, 97 N. Y. 620; *Eggleston v. Town of Chautauqua*, 90 App. Div. 314, 86 N. Y. Supp. 279. Although there may be some conflict of authority, we think the rule announced in the cases above cited is a just and reasonable one.

The assignments above discussed are the controlling ones upon which the appellant predicates its claim to a reversal. It has, however, presented other assignments of error based

upon instructions given and refused, upon the refusal of the trial court to withdraw certain items of damage from the consideration of the jury, and upon the contention that the damages awarded are excessive. We find no error in the matter of admitting or rejecting evidence. All items of damages as to which no evidence was offered were properly withdrawn from the jury, and there was evidence to support all items that were submitted. The instructions given clearly and correctly state the law applicable to the issues, and are free from prejudicial error. Referring to the amount of damages, we find no conflict in the evidence touching the nature and extent of respondent's injuries. The award may be full compensation, but it appears that the respondent has been crippled for life, that her health has been permanently impaired, that she is afflicted with traumatic neurasthenia, that she is constantly growing worse, and that she has suffered most serious injuries, all the result of the accident. The trial court sustained the verdict, and we are unable to conclude that it is excessive. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

[No. 8873. Department Two. August 20, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Minnie E. Galbraith et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—IRRIGATION—PRIVATE OR PUBLIC USE—CONSTITUTIONAL LAW. Const., art. 1, § 16, prohibiting the taking of private property for private use, except for drains, flumes, or ditches for agricultural etc., purposes, and art. 21, § 1, providing that irrigation etc. purposes shall be deemed a public use, confer legislative authority for Rem. & Bal. Code, §§ 6326 *et seq.*, authorizing the condemnation of land for irrigation ditches by a private owner of agricultural lands.

EMINENT DOMAIN—PUBLIC USE—DETERMINATION. The declaration in const., art. 1, § 16, that the question of public use shall be a ju-

[1]Reported in 110 Pac. 429.

dicial question to be determined irrespective of legislative assertion, does not mean that it is to be determined without reference to constitutional assertions upon the subject.

EMINENT DOMAIN—IRRIGATION—ARID LANDS—NECESSITY—BENEFITS. The right to condemn rights of way for irrigation is not limited to the owners of arid land; and sufficient benefit will result to warrant condemnation for irrigation where it appears that the land is semi-arid, raising only a light crop of wheat or wheat hay or crops maturing early in July, while with irrigation it will produce abundantly almost any crop and will be increased $125 to $150 per acre in value.

EMINENT DOMAIN—IRRIGATION—NECESSITY. The right to condemn rights of way for irrigation contemplates irrigation by gravity, and cannot be defeated by the fact that the land could be irrigated by pumping.

EMINENT DOMAIN—IRRIGATION—USE OF LAND. Condemnation for an irrigation canal by a water company owning the lands which it seeks to irrigate cannot be defeated by the fact that the company intends to sell the irrigated lands and that its purpose is speculative.

Certiorari to review an order of the superior court for Spokane county, Hinkle, J., entered April 29, 1910, adjudging a public use and necessity in condemnation proceedings by an irrigation company. Affirmed.

Peacock & Ludden, for relators, contended, among other things, that the act in question should not be construed to authorize condemnation for speculative purposes. *Crisman v. Heiderer*, 5 Colo. 589; Weil, Water Rights, Western States, § 256. The water company is not acting as a public servant, and the public must have a right to the actual use of the water. *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269; *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672; *Borden v. Trespalacios Rice & Irr. Co.* (Tex. Civ. App.), 82 S. W. 46; *Pittsburg etc. R. Co. v. Benwood Iron-Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680; *Varner v. Martin*, 21 W. Va. 534; *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. 855, 61 L. R. A.

129; *In re Barre Water Co.*, 72 Vt. 413, 48 Atl. 653, 82 Am. St. 914; *Avery v. Vermont Elec. Co.*, 75 Vt. 235, 54 Atl. 179, 88 Am. St. 818, 59 L. R. A. 817; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. 438; *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 109 Am. St. 526, 70 L. R. A. 472; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842. Where the use is not a public use, the fourteenth amendment to the Federal constitution is violated. *State ex rel. Tacoma Industrial Co. v. White River Power Co., supra; Missouri Pac. R. Co. v. Nebraska*, 164 U. S. 403; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 158; *In re Tuthill*, 163 N. Y. 133, 57 N. E. 303, 79 Am. St. 574, 49 L. R. A. 781.

Allen & Allen, for respondents.

PARKER, J.—The respondent Spokane Valley Land & Water Company, which we will hereafter call the company, commenced eminent domain proceedings in the superior court for Spokane county to acquire a right of way over land of the relators for the purpose of a canal to carry water to and irrigate land belonging to it. The cause came on for hearing before the court upon the questions of public use and necessity, when the court, after the introduction of evidence and argument of counsel upon those questions, adjudged that the proposed use was public and that the right of way sought to be acquired was necessary to the proposed use, and ordered a jury to be empanelled to determine the amount of damages resulting to the relators on account of the taking. The relators, considering themselves, aggrieved, have by writ of review brought the cause to this court, asking a reversal of these rulings of the trial court; their main contention being that the company's proposed use of the right of way sought to be acquired is not a public use.

The company claims the right to acquire by condemnation a right of way for its proposed irrigation canal over the

relators' land under the provisions of chapter 131, p. 261, Laws of 1899 (Rem. & Bal. Code, § 6325 *et seq.*), which, so far as necessary for us to notice, are as follows:

"§ 6326. All persons who claim, own or hold possessory right or title to any land, or parcel of land or mining claim within the boundaries of the State of Washington, when such lands, mining claims or any part of the same are on the banks of any natural stream of water, shall be entitled to the use of any water of said stream not otherwise appropriated for the the purposes of mining and irrigation to the full extent of the soil for agricultural purposes.

"§ 6327. When any person owning claims, lands or mining claims as specified in the foregoing section, is not a riparian proprietor or being such has not sufficient frontage on said stream, lake, artificial stream, ditch or reservoir, to obtain a sufficient flow of water to irrigate his land or use on his mining claim, he shall be entitled to the right of way through the farms or tracts of lands or other mining claims which lie between him and said stream, lake, artificial stream, ditch or reservoir, or the farms, tracts of lands or mining claims which lie above and below him on said stream, lake, artificial stream, ditch or reservoir.

"§ 6328. Such right of way shall extend only to a ditch sufficient for the purpose required, together with the right of ingress and egress to construct, maintain and repair the same; and whenever any person or persons find it necessary to convey water for the purposes of irrigation or mining through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable upon which can be constructed with uniform or nearly uniform grade, and discharging the water at a point where it can be conveyed to and used upon the land or lands or mining claim of the person or persons constructing such ditch, canal or works.

"§ 6329. Upon the refusal of the owner of the lands, lessees or those in possession, through which it is proposed to run said canal, ditch or works to permit the passage of the same through their property the person or persons desiring the right of way for such ditch, canal or works may proceed to condemn and take the right of way therefor as hereinafter provided."

The substance of the facts upon which the learned trial court based its decision may be briefly summarized from its findings as follows: The respondent company is a corporation, organized and existing under the laws of this state for the purpose of owning lands and water rights, and for the purpose of constructing and maintaining irrigating canals and ditches and conducting water through the same to irrigate such lands. The Spokane river flows westerly through the county of Kootenai, in the state of Idaho, and the county of Spokane, in the state of Washington. The company has appropriated and acquired the right to divert and use for irrigation purposes 250 cubic feet per second of time of the water flowing in the Spokane river, at a point about five miles east of the boundary line between the states of Idaho and Washington, to be conveyed by a canal in a westerly direction in the valley of the Spokane river through the counties mentioned a total distance of nineteen miles. The company has caused the line of its proposed canal to be surveyed and located upon the ground from the point of diversion in a westerly direction a distance of nearly nineteen miles, and has constructed and completed twelve miles of its canal, with lateral ditches leading therefrom by means of which large quantities of land are being irrigated. The company is the owner of lands amounting to about 1,500 acres in Spokane county situated along and adjacent to the proposed line of its canal where the same is not yet completed. These lands, without irrigation, will produce no crops of value and are of little value, but with irrigation will produce large and valuable crops of vegetables, grain, hay, fruits, and other agricultural products. These lands the company desires and intends to irrigate with the water from its proposed canal, and it has sufficient water for that purpose which it can convey through its proposed canal providing it is completed so as to reach these lands. The line of the proposed canal is located through the land of the relators where the company seeks its right of way therefor, which line so located is the most direct

route practicable upon which the canal can be constructed with uniform or nearly uniform grade and discharge the water by gravity at a point where it can be used upon the lands of the company proposed to be irrigated thereby; and the right of way for the proposed canal over the land of the relators is necessary for the construction thereof and to enable the company to irrigate its lands which are along and adjacent to the proposed line of the uncompleted portion of the canal. A portion of the lands of the company sought to be irrigated by this proposed canal abut upon the Spokane river, but the larger part of the lands do not abut upon the river, and are separated therefrom by land not owned by the company and the company has not sufficient frontage to obtain a sufficient flow of water to irrigate the lands proposed to be irrigated; and it is impracticable and unprofitable to irrigate any of the lands by pumping water from the Spokane river or from wells, or in any other manner than that proposed by the company. In connection with this last fact, it may be stated, though the court made no findings thereon, that the evidence shows that practically all of the land abutting upon the river is too high above the river to be irrigated by gravity from any point at which such lands abut upon the river.

Exceptions were taken by counsel for the relators to most of the findings, the substance of which we have briefly stated; but a careful reading of all the evidence brought here for our review convinces us that the court found the facts substantially as they exist, except that the lands of the company sought to be irrigated may not be quite so arid and devoid of crop producing value as the findings indicate. This fact, however, does not affect our conclusions, as will be seen later. We regard the foregoing as all the material facts affecting the right of the company to condemn, though we will later have occasion to notice some other facts in connection with some minor contentions made in behalf of the relators.

By far the larger part of the argument of learned counsel

for the relators is based upon the fact that the company is not a public service corporation, and that it does not claim the right to condemn the land of the relators upon that ground, but claims the right only as any single private landowner may claim such right under this law. We will proceed upon the assumption that such is its claim; and that the company is under no obligation whatever to serve the public, though we do not decide what its public service obligations are.

It is the law in this state, as it appears to be in many western states having large areas of arid land capable of being reclaimed or rendered more productive by irrigation, that the test of public use in the acquiring of water rights and rights of way for canals and ditches to convey water to land for the purpose of irrigating the same is not necessarily the service the parties seeking to acquire such rights may be compelled to render to the public in connection therewith. Sec. 16, art. 1 of our state Constitution, provides,

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes."

Here is an inference so strong as to amount almost to an affirmative declaration that private property may be taken for private use when the use is confined to the purposes enumerated in this provision, one of which is ditches on or across the land of others for agricultural purposes; and it is no strained construction of the provision to say that this includes ditches for irrigation purposes, in view of the vast extent of arid land within our state and the benefits of irrigation thereto in the increase of its productiveness and value. The very thought of agriculture in connection with this vast arid portion of our state suggests irrigation in connection therewith. These facts and conditions were well known at the time of the making of our constitution, and it seems idle to doubt that they were in the minds of both the constitution

framers and the people in the making and adoption of that instrument as the fundamental law of the state. The constitution further provides in sec. 1, art. 21,

"The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use."

Learned counsel for the relators call our attention to the case of *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, where it was held that this last-quoted provision does not authorize the giving of the power of eminent domain to a private manufacturing company, to enable it to acquire water rights by condemnation; from which it is argued that, since this respondent company is under no obligation to serve the public, but seeks only to acquire this right of way for the purpose of conveying its own water to its own land for irrigation thereof, it is in no better position to assert the right of eminent domain than was the Tacoma Industrial Company in that case. We do not think that decision is controlling here, as is clearly indicated by the comment therein upon the irrigation case of *Clark v. Nash*, 198 U. S. 361, affirming the supreme court of Utah, which case was there cited as apparently supporting the Industrial Company's right to condemn. Judge Rudkin, in speaking for this court, there said, at page 670:

"There is, however, a vast difference between the use of water for manufacturing and for irrigation. In the latter case, there is no choice of means or location. The necessity is an absolute one, if the land is to be reclaimed at all. Not so, with a manufacturing plant. The question of location and motive power is one of economy and convenience at most."

We have seen that this statute, under which the company claims the right to condemn, clearly purports by its terms to give this right without any reference whatever to any obligation on the part of the party seeking to condemn to serve the public. Learned counsel's argument does not seem to be an attack upon the constitutionality of the law, but is, in effect,

that the question of public use must be determined solely as a judicial question regardless of the legislative assertion upon that subject. In support of this view, reliance is placed upon the concluding language of section 16, art. 1 of the state constitution, which is as follows:

"Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."

But this does not mean that in judicially determining a question of public use we are to lose sight of all other constitutional provisions. We have quoted the constitutional provision which clearly indicates that property may be taken under the power of eminent domain for certain enumerated private uses, among which are ways for ditches for agricultural purposes. While this provision in terms seems to give the power to take for private use, it was evidently adopted upon the theory that the public would be sufficiently benefited by the taking for such a purpose to warrant the taking; that is, though it be seemingly called a private use by these words of the constitution, it is also in effect a public use in view of the necessities of a state like ours having vast areas of arid land. These considerations lead us to conclude that, notwithstanding our constitution has declared that the question of public use shall be a judicial one, and is to be determined without reference to legislative assertion upon the subject, such question is not to be so determined without reference to constitutional assertions upon the subject.

The supreme court of Utah, under a law giving the right of condemnation for irrigation substantially as is given in this law, in the case of *Nash v. Clark*, 27 Utah 158, 75 Pac. 371, 101 Am. St. 953, 1 L. R. A. (N. S.) 208, held that a private owner of 80 acres of arid land had the right to acquire a right of way by condemnation over private property for the purpose of conveying water to such land for irrigation there-

of, and that in view of the conditions existing in that state such use of the water and the right of way sought to be acquired for its conveyance is a public use. It appears in that decision that the court gave no consideration to any constitutional provision save, "Private property shall not be taken or damaged for public use without just compensation," which is there considered as meaning "That private property cannot be taken for strictly a private use." We assume that the court did not regard any other provision of the Utah constitution as bearing upon this subject. Therefore it would seem that the court reached its conclusion without the aid of other constitutional provisions such as are found in our state, which we have seen clearly indicate that property may be acquired by right of eminent domain for such use. That case was removed to the supreme court of the United States, *Nash v. Clark*, 198 U. S. 361, by writ of error, and there affirmed, the court holding that the right of eminent domain thus conferred was within the legislative power of the state of Utah, and did not violate any rights guaranteed by the Federal constitution.

The supreme court of Montana also upholds the right of condemnation for irrigation purposes in favor of private landowners. *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757, under a state constitutional provision reading as follows:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and acqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

This provision, it seems to us, goes no farther in support of this right than those we have quoted from our constitution. The following decisions from this court lend some support to this view, though they do not involve this exact ques-

tion. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36. The latter involved the validity of this same law, but not on the question of public use. 1 Lewis, Eminent Domain (3d ed.), § 308; *Oury v. Goodwin*, 3 Ariz. 255, 26 Pac. 376; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112.

These authorities, we think, support the company's contentions in this case, though they relate to an exercise of the right of eminent domain by, or for the benefit of, more than a single landowner. If, however, this point be urged to avoid the force of these authorities in support of the company's contention in the present case because the right is here claimed by a single private landowner, we would answer it in the language of the supreme court of Montana, used in the *Ellinghouse* case, at page 464, as follows:

"What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation by the same means of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit."

The benefit to the public which supports the exercise of the power of eminent domain for purposes of this character, is not public service, but is the development of the resources of the state, and the increase of its wealth generally, by which its citizens incidentally reap a benefit. Whether such development and increased wealth comes from the effort of a single individual, or the united efforts of many, in our opinion does not change the principle upon which this right of eminent domain rests. What we have said thus far is sufficient to determine the case, so far as the general principle involved is

concerned. It only remains to notice some minor contentions made in behalf of the relators.

We have noticed that the land sought to be irrigated may not be so arid and devoid of agricultural value as indicated by the court's findings. Exception was taken to the findings upon this question, and it is contended that the land is not in fact so devoid of agricultural value as to warrant the exercise of the condemnation right here sought. We are convinced, however, from the evidence that in any event the value and usefulness of the land from an agricultural standpoint will be very materially enhanced by its proposed irrigation. One of the witnesses testified, in substance, that without irrigation about the only crop that is raised in this valley is a light crop of wheat or wheat hay, and that with irrigation there can be raised all the so-called small fruits, also alfalfa, sugar beets and vegetables, all producing good crops; and that the land with water is worth several times as much as without water. Another witness testified that it is semi-arid land and without irrigation will grow fairly good crops of wheat, and wheat and oat hay; but will grow only such crops as mature before the middle of July, after which it dries up; and that with irrigation it will produce abundantly most any crop put upon it; and that irrigation will increase its value from $125 to $150 an acre over its value without irrigation. The testimony of these witnesses is not materially different from that of others. The witnesses differ somewhat in their opinions as to the extent of the wheat and oat crops capable of being produced without irrigation; but all agree that irrigation very materially enhances the productiveness of the land. Neither the constitution nor this law limits the right of condemnation to owners of land which is entirely devoid of agricultural value without irrigation, and we think the evidence clearly shows that a sufficient benefit will result to the land by the proposed irrigation to warrant the exercise of the right of eminent domain here invoked to accomplish that end. *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 166.

It is also claimed in behalf of the relators that the evidence shows, and findings were so requested, that the water in the river flowing by portions of the land, and the water under the land which could be reached by wells, was sufficiently accessible to enable the owner to irrigate by pumping. It is true the evidence indicates that water may be gotten upon the land to some extent by this method; but we think the evidence also shows that such method is not at all a practical or profitable method of irrigation, as compared with the method proposed; besides, it is clear that the constitution and this law both contemplates irrigation by gravity; and we do not think the right to condemn was intended to be withheld simply because water might be put upon the land by pumping.

It is also claimed that the learned trial court erred in refusing to find that the company is engaged, and has been engaged, in buying up lands for the purpose of bringing the same under irrigation by means of its canal as already constructed and as proposed to be constructed; and that its purpose is speculative. Finding upon this fact was evidently refused because the learned trial court regarded such fact as immaterial rather than because such fact did not exist. We agree with the learned trial court that as long as the lands are proposed to be irrigated for the purpose of enhancing their agricultural productiveness and value, it is utterly immaterial what the purpose of the company was in acquiring the lands or whether it proposes to farm the lands itself or proposes to sell them off in tracts of varying size to others. The fact remains that the company owns the water and owns the lands proposed to be irrigated, and that their irrigation will promote the public good by a means intended to be fostered by our constitution. Of course it acquired the lands with intent to profit by their use or sale. That is only exercising a right incident to ownership as any private owner may exercise it.

We are of the opinion that the proposed use of the right of way sought to be acquired over the relator's land is such as to

support the exercise of the right of eminent domain in acquiring the same by this respondent company, under the provisions of our constitution and this law. The judgment of the learned trial court is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8996. *En Banc.* August 22, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Schuyler Duryee, Plaintiff*, v. I. M. HOWELL, *as Secretary of State, and* W. P. BELL, *as Attorney General, Defendants.*[1]

ELECTIONS—PRIMARY ELECTIONS—BALLOTS—"CONGRESSIONAL" OFFICE—FIRST AND SECOND CHOICE—STATUTES. The primary election law requiring first and second choice voting for candidates for a "congressional office", where there are four or more candidates, does not extend to or include United States senators, in view of Rem. & Bal. Code, § 4805, where the word "congressional" is qualified by the word "elective" which is not applicable to United States senators within the meaning of state election laws; and in view of the form of the pledge to be signed by state senators and representatives; and Id. § 4813 prescribing different positions in the election ballot in which shall be placed the names of candidates for "congressional office" and for "preference for United States senators", above the former being the warning "vote for both first and second choice", and above the latter being the warning "vote for one choice only." the sample ballot containing the names of four senatorial candidates.

Application filed in the supreme court August 20, 1910, for a writ of mandamus to compel the secretary of state to prepare and certify a certain official ballot for a primary election. Writ denied.

Hulbert & Husted, for plaintiff.

The Attorney General, and *W. V. Tanner* and *Geo. A. Lee, Assistants*, for defendants.

[1]Reported in 110 Pac. 543.

RUDKIN, C. J.—Section 4822, Rem. & Bal. Code, provides that,

"In all cases where there are four or more candidates of any political party for one state or *congressional* position, every elector voting at a primary election held under the terms of this act shall be required to designate one first choice and one second choice for each such position."

Section 4811 provides that,

"At least twenty days before any September primary the secretary of state shall transmit to each county auditor a certified list containing the name, postoffice address and party designation of each person entitled to be voted for at such primary, and the office for which he is a candidate, as appears by the nomination papers filed in his office."

Section 4831 provides that,

"It shall be the duty of the secretary of state and attorney general, on or before July 1, 1907, to prepare all forms necessary to carry out the provisions of this act, which forms shall be substantially followed in all primaries held in pursuance hereof."

Section 4829 provides that,

"Whenever it shall appear by affidavit to any judge of the supreme court or superior court of the county that any error or omission has occurred or is about to occur in the printing in the name of any candidate on official ballots, or that any error has been or is about to be committed in printing the ballots, or that the name of any person has been or is about to be wrongfully placed upon such ballots, or that any wrongful act has been performed or is about to be performed by any judge or clerk of the primary election, the county auditor, canvassing board or member thereof, or by any person charged with a duty under this act, or that any neglect of duty by any of the persons aforesaid has occurred, or is about to occur, such judge shall, by order, require the officer or person or persons charged with the error, wrongful act or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty, and to do as the court shall order, or to show cause forthwith why such error should not be cor-

rected, wrongful act desisted from, or such duty or order not performed."

At the ensuing primary election to be held on the 13th day of September, 1910, there will be four or more candidates of the Republican party for the office of United States senator, the relator, Schuyler Duryee, being one of such candidates. This is an original application for a writ of mandamus in his behalf, against the secretary of state and the attorney general, to compel these officers to so prepare and certify the official ballot to the several county auditors that the electors of the state will have an opportunity to designate their first and second choice for the office of United States senator; and the application of the second choice provisions of the direct primary law to that office is the only question presented for our consideration. The provisions of the primary law tending to throw light on the question thus presented are the following:

Section 4805, Rem. & Bal. Code, provides that, "Hereafter, all candidates for elective offices in this state, either state, county, municipal, precinct or congressional, shall be nominated at a direct primary election held in pursuance of this act. . . ." Section 4808, relating to the fee and the time for filing declarations of candidacy, provides that, when the candidacy is for a state, *congressional* or district office, embracing more than one county, the fee shall be paid to the secretary of state. Section 4810 provides that declarations of candidacy for state offices, United States senators, representatives in congress and those members of the state legislature and judges of the superior court whose districts comprise more than one county shall be filed in the office of the secretary of state. Section 4813 prescribes the form of ballot and the method of voting, and so far as material to the question now under consideration, provides as follows:

"The position shall be arranged as follows, provided nominees for such positions are to be selected in said county under the provisions of this act hereinafter provided: First, con-

gressional; next, state; next, preference for United States senators; next, legislative; next, county officers; next, precinct officers; in all cases following under each heading here given, the rotation used in the make-up of the various ballots at the general election. . . . When there shall be four or more candidates for any state or *congressional* office, there shall be printed immediately under the designation of office the following: 'Vote for both first and second choice for this office.' On the next line shall be printed the words 'To vote for a person for first choice, mark a cross (X) in the first square at right of the name of the person for whom you desire to vote.' 'To vote for a person for second choice, mark a cross (X) in the second square after the name of the person for whom you desire to vote.' The form of ballot shall be substantially as follows:"

So much of that form as we deem material is here given:

PRIMARY ELECTION BALLOT

.....Party

Designation of Party.

.....County

To vote for a person, make a cross (X) in the square at the right of the name of the person for whom you desire to vote.

Congressional	First Choice	Second Choice	Vote for one choice only	
Representative in Congress Vote for both first and second choice for this office.	Vote for	Vote for	United States Senator	Vote for One
John Doe.....	.....	.....	John Doe.....	.....
John Doe.....	.....	.....	John Doe.....	.....
John Doe.....	.....	.....	John Doe.....	.....
John Doe.....	.....	.....	John Doe.....	.....

Section 4828 provides that "The canvassing of the vote and the returns of reports of the primary election, as to candidates for state offices, United States senators and representatives in Congress, and any other candidate whose district extends beyond the limits of a single county, shall be done by a canvassing board consisting of the secretary of state, state

treasurer and state auditor." Section 4840 provides that "It shall be the duty of the secretary of state to certify to both houses of the legislature the names of the persons of each political party for whom the highest number of votes were cast at any primary election under the provisions of this law at which any persons were candidates for the nomination for United States senators, said certificates to be made and filed upon the first day of the session of such legislature convening next after said primary election." Section 4841 provides that any candidate for the office of state senator, or member of the house of representatives may, if he so desires, sign and file with his declaration of candidacy a declaration to the people of the state of Washington, and particularly of his legislative district that during his term of office he will always vote for the candidate for United States senator who has received the highest number of votes upon his party ticket for that position, at the primary election next preceding the election of United States senator, and in such case there shall be printed on the official printed ballot opposite or just below his name the following: "Pledged to vote for party choice for United States senator."

The right of the relator to the relief demanded depends largely upon the meaning to be given to the term "congressional," as employed in the different sections of the primary law. Thus, by section 4805, the provisions of the act are extended to all candidates for elective offices, either state, county, municipal, precinct or congressional. The term "congressional office" is again used in section 4813, and the term "congressional position" in section 4822.

Under section 1, of article 1, of the constitution of the United States, all legislative power is vested in a congress which shall consist of a senate and a house of representatives, and both senators and representatives are members of congress, or congressmen. The term congressman, or member of congress, however, is usually employed to designate a member of the lower house, and the term congressional is

often employed with exclusive reference to that body. But the legislative intent must be gathered from the entire enactment and not from the technical definition of a single word. In section 4805 the word "congressional" is qualified by the word elective, and while United States senators are elected by state legislatures, the office is not an elective one within the meaning of state election laws.

The meaning of the term "congressional office," as used in section 4813, is explained in an earlier provision of the same section, which prescribes the order or position in which the names of candidates shall be arranged on the primary ballot: First, congressional; next, state; next, preference for United States senators, thus showing very clearly that United States senators are not congressional officers within the purview of that section. For the like reason the office of United States senator is not included in the term "congressional position" in a later section. This view of the statute is strengthened by the provisions requiring the secretary of state to certify to both houses of the legislature the name of the persons of each political party for whom the highest number of votes were cast at the primary election for the nomination for United States senators, and by the form of the pledge to be signed and filed by state senators and representatives. While these latter provisions are not wholly inconsistent with second choice votes, they are far more consistent with a single choice.

But if there were a doubt as to the proper construction of other provisions of the act, that doubt is removed by the form of ballot which the legislature has itself prescribed in section 4813. The form of ballot there given follows literally the provisions of the section preceding it. It first contains the names of candidates for representatives in congress; next, the names of candidates for the several state offices; and next, the names of candidates for United States senators. Above the names of candidates for representatives in congress and state offices is a warning to the voter to vote for both first and

second choice for these offices, while above the names of candidates for United States senators is a warning to vote for one choice only. To remove any room for doubt, the names of four senatorial candidates are inserted, which would bring the ballot within the second choice provision of the statute if that provision had any application.

To avoid the force of this provision the relator contends that legislative forms are only directory and that a substantial compliance therewith satisfies the requirements of the law. As a rule, this contention is sound, but we are not asked to uphold a form of ballot which substantially conforms to the requirements of the law. On the contrary, we are asked to compel a state officer to certify a form of ballot at variance with the form prescribed by the legislature itself. This we must decline to do.

From a consideration of the entire act, we are convinced that the legislature did not intend that the second choice provisions of the direct primary law should extend to or include the office of United states senator, and the writ is accordingly denied.

MORRIS, FULLERTON, DUNBAR, CHADWICK, CROW, and PARKER, JJ., concur.

[No. 8733. Department Two. August 23, 1910.]

ED KOTH, *Appellant*, v. A. E. KESSLER *et al.*, *Respondents*.[1]

APPEAL—RECORD—DISMISSAL—BRIEFS. Where there was nothing of record to show any appeal by a party, there can be no dismissal of the appeal and a statement in the briefs that he had appealed will be ignored.

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACT BY HUSBAND. A contract for the sale of community land not executed by the wife of the vendor is not void, but only voidable.

FRAUDULENT CONVEYANCES—CHATTEL MORTGAGES—CONSIDERATION—VOIDABLE LAND CONTRACT. Notes and a chattel mortgage given in part payment of a voidable land contract not executed by the vendor's wife cannot be set aside as a fraud upon creditors on the theory that they were given without consideration.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered January 8, 1910, upon findings in favor of the defendants, after a trial on the merits, in an action to set aside fraudulent conveyances. Affirmed.

Merritt, Oswald & Merritt and *W. M. Nevins*, for appellant.

Davis & Davis and *Zent & Cannon*, for respondents.

PARKER, J.—The plaintiff, being a judgment creditor of the defendants Lobe and wife, brought this action to have set aside, upon the ground of fraud and want of consideration, four certain chattel mortgages given by the defendants Lobe and wife to Kessler. A trial before the court resulted in findings and judgment denying the relief prayed for, and the dismissal of the action. The plaintiff has appealed from this disposition of the case.

Statements made in the briefs of counsel, both for appellant and respondents, indicate that the inteverner, Vehrs, served notice that he joined in the appeal of the plaintiff.

[1]Reported in 110 Pac. 540.

We find no such notice in the record brought here. Counsel for respondents move to dismiss the appeal of intervener, Vehrs, and to affirm the judgment as to him, because such appeal has not been perfected by filing a bond. In the reply brief of counsel for appellant Koth, it is stated by them that they are not attorneys for the intervener, Vehrs, and that they inadvertently signed their opening brief in this case as "attorneys for appellants." It is apparent, therefore, that we will have to ignore any appeal by Vehrs, since we have no record showing he is an appellant, nor any appearance for him in this court. We cannot dismiss his appeal, assumed by counsel for respondents to have been taken, for the reason it is not before us in any form.

Learned counsel for appellant excepted to certain of the findings made by the trial court, and also excepted to the refusal of the court to make certain findings requested by them. The principal contentions made in behalf of appellant are based upon facts which we think the record shows to be either conceded or proven beyond controversy. We will first consider these facts, and state our views touching the rights of the parties as affected thereby.

Appellant is the owner, by assignment, of four certain judgments, rendered against respondents Lobe and wife on November 12, 1907, November 23, 1907, January 16, 1909, and February 1, 1909, for the aggregate amount of approximately $900. On October 20, 1908, respondent Kessler entered into a contract with respondent Gustav Lobe by the terms of which Kessler agreed to sell, and Lobe agreed to purchase, a tract of land in Spokane county, for $4,000, payable $1,500 on September 1, 1909, $900 on December 1, 1909, $1,000 on September 1, 1910, and $600 on September 1, 1911. This land was acquired by Kessler after marriage, but his wife did not join in the execution of the contract by signing the same. This contract contains conditions that would work a forfeiture of the purchaser's rights there-

under in the event of failure to make payment of the installments of purchase price as they became due.

On October 22d, 1908, Lobe and wife executed and gave to Kessler a promissory note for $1,500 and a chattel mortgage upon certain of their property to secure the payment thereof; on May 26, 1909, Lobe and wife executed and gave to Kessler another promissory note for $900 and a chattel mortgage upon certain of their property to secure payment thereof; and on July 20, 1909, Lobe and wife executed and gave to Kessler another promissory note for the sum of $900 and a chattel mortgage upon certain of their property to secure payment thereof. These three notes and mortgages were given and accepted for the payments upon the land sale contract made between Kessler and Lobe, which by the terms of that contract became due $1,500 September 1, 1909, $900 December 1, 1909, and $1,000 September 1, 1910; the latter payment being discounted $100, which accounts for the last note being only $900. This left only the final payment of $600 with interest, falling due September 1, 1911, unaffected by these notes and mortgages. On December 23, 1908, Lobe executed and gave to Kessler a promissory note for $500 and a chattel mortgage upon certain of the community property to secure payment thereof. This was for money loaned by Kessler to Lobe. These four chattel mortgages the appellant seeks to have set aside upon the ground that they were given and accepted without consideration, and with intent to defraud Lobe's creditors; and to have the property covered by them subjected to the payment of appellant's judgments.

The principal contention of learned counsel for appellant relates to the three notes and mortgages given for the purchase price installments upon the land contract. It is alleged that, since this contract is for the sale of real estate which is presumably community property, and the wife did not join therein, it is absolutely void, and that Lobe acquired no rights whatever under it; and hence, the giving of the notes and mortgages were without consideration and for

that reason void as to Lobe's creditors. Our attention is called to former decisions of this court, among them the following, which may be considered the most favorable to appellant's contention: *Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841; *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213; *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172.

It is true that these cases hold that, as a general rule, specific performance of such a contract cannot be enforced against the community, and to that extent the contract is voidable, but we think other decisions of this court show that it does not regard such a contract as void merely because both the husband and wife do not join in its execution. The following cases so indicate: *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Payne v. Still*, 10 Wash. 433, 38 Pac. 994; *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715; *O'Connor v. Jackson*, 33 Wash. 219, 74 Pac. 372; *Stevens v. Kittredge*, 44 Wash. 347, 87 Pac. 484.

Learned counsel for appellant assume, as stated in their brief, that "The wife could defeat any action that might be brought to subject the real estate to the payment of appellant's claim." This is equal to saying that she could defeat Lobe's rights under the contract to purchase the land merely because she did not sign it with her husband. The cases last cited showed many possible conditions under which she could not defeat Lobe's rights under the contract. Now there is no evidence whatever upon the question of Kessler's authority to enter into this contract for the sale of the land, one way or the other. Must we then presume that he had no authority merely because the property is presumed to be community property? Was the burden upon him in this case to show such authority? The question might arise under such circumstances that he would have the burden of showing such authority; but he is here a defendant, resisting a charge of fraud and want of consideration for the making and delivery to him of the notes and mortgages. This is what the

appellant undertook to prove, and had the burden of proving, by commencing this action. It seems to us that, when appellant's proof went no farther towards showing want of consideration than to show that this land contract (which is the consideration for the notes and mortgages) was not executed by both husband and wife, he has not shown such want of consideration; nor has he shown such facts as shift the burden of proof upon Kessler as to that question. We are of the opinion that these facts standing alone do not show such want of consideration in support of the notes and mortgages as will warrant the setting aside of them at the instance of the creditors of Lobe.

There was considerable testimony upon the question of Lobe's alleged intent to defraud his creditors and Kessler's knowledge thereof in the giving and accepting of these notes and mortgages. Upon these matters the testimony was in serious conflict, and without attempting to review it here in detail, we deem it sufficient to say that we are not inclined to disturb the learned trial court's conclusions thereon, to the effect that he deemed it insufficient to support the charge of fraud in the making of the notes and mortgages, or to warrant the granting of the relief prayed for upon that account; especially in view of the better opportunity of the learned trial judge to determine the weight of this conflicting testimony, given by the several witnesses. It may be worth while to observe, however, that it does not appear but that the land is of the value of the $4,000 purchase price agreed to be paid by Lobe. The giving of the notes and mortgage for the first, second and third installments upon the land contract at least had the effect of saving each of those installments from default; so that the contract is evidently not subject to forfeiture until there be a default in the last installment, which will not be due until September 1911. It also seems evident that this land purchase and the giving of those notes and mortgages for three of the installments did not lessen the value of the resources of Lobe.

We conclude that the judgment must be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, and CROW, JJ., concur.

[No. 8850. Department Two. August 23, 1910.]

GILBERT HUNT COMPANY, *Respondent*, v. WILL H. PARRY, *Receiver of the Pasco Water and Power Company, Appellant.*[1]

MECHANICS' LIENS—"MATERIALS"—WHAT CONSTITUTES—TOOLS AND APPLIANCES. Under Rem. & Bal. Code, § 1129, giving a lien to any person performing labor or furnishing material to be used in the construction of any building, ditch, etc., a lien upon the irrigation ditches and power plant of a water company cannot be claimed for tools and appliances used to carry on the work of construction and not intended to enter into and become a part of the structures when completed.

SAME—SEGREGATION OF LIENABLE ITEMS. Where an undeterminable portion of the items forming a large part of a claim for a lien are not lienable the lien must fail as to all the items.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 3, 1910, upon findings in favor of the plaintiff, in an action to foreclose a contractor's lien. Reversed.

Bausman & Kelleher, for appellant.

Samuel R. Stern, for respondent.

PARKER, J.—This is an action to foreclose a lien claimed by the plaintiff upon the buildings, structures, ditches, etc. constituting the power and irrigation plant of the Pasco Power and Water Company, and also upon several thousand acres of land of that company proposed to be irrigated by the plant. A trial before the court resulted in a judgment of foreclosure, and an order for the sale of the property to

[1]Reported in 110 Pac. 541.

satisfy the plaintiff's claim. The defendant has appealed.

The Pasco Power and Water Company is a domestic corporation, engaged in a general scheme and enterprise in the county of Walla Walla, along the Snake river, having for its purpose the irrigation of several thousand acres of land and the building of irrigation ditches and pumping plants, all as a part of one general scheme for the improvement of its land. Between February 5 and November 9, 1907, the appellant furnished to the Pasco Power and Water Company a large number of articles, expended money in paying freight and cartage thereon to the place of delivery, and performed other services in connection with the furnishing and delivery of the articles, all of which we will assume entered into the cost thereof. These articles aggregate in value the sum of $5,428.45, upon which there was paid from time to time, without any direction as to how such payment should be applied, sums aggregating $1,633.50 and upon which there were given certain other credits because of overcharges and errors, aggregating $265.40, leaving a balance due of $3,529.55, for which amount the foreclosure judgment was entered, with interest. These articles were all furnished and accepted for the purpose of being used by the Pasco Power and Water Company in connection with the construction of the buildings, structures, ditches, etc. upon its land.

A careful reading of all the evidence convinces us, however, that these articles were not furnished with the understanding or intent that all of them were to be used in the construction of the structures and ditches upon the land of the Pasco Power and Water Company, in the sense that they were all to enter into and become a part of such structures or ditches when completed; but that they were furnished with the understanding that they were to be used in connection with such construction—at least, for the most part—only as tools and appliances to carry on such construction. The list of items so furnished, with the charge for each, shown by an exhibit in the record, admitted to be correct, covers many typewritten

pages. There are, among others, such items as horse shoe nails, hammers, straps for steam shovel, blacksmith's coal, dump car trucks, rental for engine, curry combs, horse brushes, slides for donkey engine, truck axles, tar, draw heads and springs therefor, car wheels, lathe work on axles, blacksmith's work on axles, drills, putting on car wheels, brass part for steam shovel, cylinder oil, saw blades, saw set, tongs, wrenches, cup grease, files, powdered emery and emery cloth, boxes for dump cars, packing, oil can, brake shoes, and freight charges on such articles. A large number of these items are repeated many times.

It is quite plain from the record that these items, to which others might be added by closely scrutinizing the list, were not furnished to be used in, and were not used in, the buildings, structures, or ditches, but were furnished to be used and were used as tools and appliances or as repairs thereto, with which the work of constructing the plant was carried on. It is not at all difficult to go through this list of articles furnished and services rendered and pick out a sufficient quantity of them of the nature above enumerated which were clearly not intended to, and did not, become a part of the finished structure to amount in the aggregate to more than half of the entire amount furnished. Of the other items furnished, by far the greater amount of them are of such nature that, so far as can be determined from the evidence in this case, they might be put into the class we have just mentioned, or might be classed as material going into the structures. It is quite impossible to determine from the evidence, with any degree of certainty, what quantity of the items furnished belong to one class and what to the other, though it may be possible to determine that a small portion of them did actually go into the structures. We believe the foregoing statement is as favorable to the respondent's contention upon the questions of lienable items, and commingling of the lienable and nonlienable items, as can be truthfully made from this record. And since our conclusions upon these questions dispose of

the case, we need not notice facts which relate to other questions.

The provisions of section 1129 of Rem. & Bal. Code, under which this claim of lien is made, so far as we need notice that section here, reads:

"Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any . . . building . . . ditch . . . or any other structure . . . has a lien upon the same for the labor performed or material furnished. . . ."

The question confronting us is, does the furnishing of the services and materials shown by this record entitle respondent to a lien as claimed? In the case of *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 538, 78 Pac. 1106, Judge Dunbar, speaking for the court, said:

"Under the lien laws, generally, 'material' is deemed to be something that goes into, and becomes a part of, the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be mentioned, which are necessary to the complete creation of a building or structure."

And in *Tsutakawa v. Kumamoto*, 53 Wash. 231, 235, 101 Pac. 869, 102 Pac. 766, the same view was expressed by Judge Chadwick, speaking for the court as follows: "The object of these statutes is to secure a lien to the laborer and materialman for that which goes into the finished structure." Articles furnished for use merely as tools and appliances, in carrying on the work of construction, are not lienable. *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76; *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670; *Potter Mfg. Co. v. Myer & Co.*, 171 Ind. 513, 86 N. E. 837, 131 Am. St. 267; *McAuliffe v. Jorgenson*, 107 Wis. 132, 82 N. W. 706; *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36; *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 823, 48 Pac. 54; *Meistrell & Co. v. Reach*, 56 Mo. App. 243; *Basshor v. Baltimore & O. R. Co.*, 65 Md. 99, 3 Atl. 285; Kerr, Mechanics' Liens and Building Contracts, § 89; 27 Cyc. 38, 45.

Under these decisions, it is plain that this record affirmatively shows that the larger part of the items here involved are not lienable; and as to the larger part of the remainder there is no certain evidence to show they are lienable, though it is possible a considerable part of them may be lienable; but it is not possible to determine with any degree of certainty what portion of this remainder are or are not lienable. This brings us to the question of how this commingling of lienable and nonlienable items affects respondent's right to a lien.

It may be conceded that where some single nonlienable item or even several are mistakenly included in a claim of lien, and such items can be readily segregated from those which are lienable, that such fact will not necessarily destroy claimant's right of lien; but when the commingling occurs in such manner that the court is unable to determine with certainty what are and what are not lienable items in the claim made, then the rule seems to be that the entire claim of lien is of no effect. It does not appear to us that this case presents a situation where there can be a segregation and preserve respondent's lien right, as in the case of *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843, and cases there cited. The general rule is stated in Kerr on Mechanics' Liens and Building Contracts, § 377, as follows:

"When an unspecified and undeterminable portion of the materials mentioned in the claim consists of nonlienable items which cannot be segregated from the general aggregate, the claim is of no effect."

In the recent decision of this court in *Little Brothers Mill Co. v. Baker*, 57 Wash. 311, 106 Pac. 910, it was held that where lumber was furnished in such manner that it could not be determined what portion went into defendant's house, and what portion went into another house being built by the contractor, notwithstanding it was clear that some portion of the lumber did go into the defendant's house, a lien could not be maintained therefor. It seems to us in principle that is

the case here, since we cannot determine what went into the structures and what went into tools and appliances. The following authorities also support this view: *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721; *Hughes v. Lansing*, 34 Ore. 118, 55 Pac. 95, 75 Am. St. 574; *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

We are of the opinion that this case presents facts showing such a commingling of lienable and nonlienable items, even conceding that some of them are lienable, as renders respondent's claim of lien of no effect. The judgment of the learned trial court is reversed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8831. Department Two. August 25, 1910.]

ANDREW H. STAY, *Respondent*, v. SARAH L. STAY, *Appellant*.[1]

CONVERSION — COMMUNITY PROPERTY — CONDEMNATION—JUDGMENT FOR DAMAGES. A judgment for damages upon the condemnation of community property is not deemed real property upon the doctrine of equitable conversion, in a controversy between the husband and wife living separate and apart, but is personal property, subject to the control and management of the husband.

DIVORCE—DISMISSAL ON MERITS—RES JUDICATA. Where a wife was living separate and apart from her husband, after her action for a divorce had been denied on the merits, and their community property was condemned, she cannot, in the condemnation suit, seek the adjudication of her community rights or her right to separate maintenance, as she is bound by the former adjudication that she is not justifiably living separate and apart from her husband.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 26, 1910, upon the pleadings, in a contest over the proceeds of an award in condemnation proceedings. Affirmed.

[1]Reported in 110 Pac. 549.

Holzheimer, Herald & Holzheimer, for appellant.

Douglas, Lane & Douglas, for respondent.

CROW, J.—The city of Seattle commenced this action in the superior court of King county, to condemn, for street purposes, certain real estate, as the community property of Andrew H. Stay and Sarah L. Stay, his wife. The jury awarded $3,500 damages for the property taken, and judgment was entered against the city on July 13, 1908, for that sum. Sarah L. Stay, then living separate and apart from her husband, and claiming a community interest in the judgment, filed in the condemnation action a notice to the clerk of the superior court directing him not to permit a satisfaction of the judgment by her husband. On October 30, 1909, Andrew H. Stay, being unable to collect or satisfy the judgment, filed against his wife Sarah L. Stay in the condemnation action, his petition in interpleader, in which he alleged the condemnation, the appearance of the community by attorneys employed by him, the award and judgment for damages, the filing of the notice by Sarah L. Stay; that a special assessment of $850 had been levied by the city against the portion of their property not taken; that the award was needed by him to satisfy such assessment and to pay other indebtedness; and further alleged:

"That prior to the rendition of said judgment the respondent Sarah L. Stay commenced an action against this respondent in the superior court of King county, Washington, for a divorce, being cause No. 56,911, and that upon the trial of said cause a decree of divorce was on the 6th day of April, 1908, denied on the merits; that after the rendition of said judgment in this cause said respondent Sarah L. Stay again commenced an action in the superior court of King county, Washington, for a divorce on the same grounds as in her first suit, and in said suit restrained the collection of said judgment, being cause No. 61,966 in said court; that in said cause judgment was rendered in said cause against the respondent Sarah L. Stay upon the pleadings on November 2, 1908; that said respondent gave a supersedeas bond and ap-

pealed to the supreme court of the State of Washington, in which court said judgment was affirmed."

To this petition, Sarah L. Stay, on December 9, 1909, interposed an answer, in which, without denying any of its material allegations, she affirmatively alleged that for more than two years she had necessarily and justifiably lived separate and apart from her husband, that she had maintained and supported herself, and that he intended to collect and appropriate the judgment to his own use and exclude her from its benefits. On these pleadings, judgment was on motion entered in favor of the husband, authorizing him to collect and satisfy the judgment. The defendant Sarah L. Stay has appealed.

Appellant, invoking the doctrine of equitable conversion, contends that, by reason of the involuntary alienation of the community property in the condemnation proceeding, the judgment for damages should be regarded as community real property, and that she should be entitled to have her rights to such community reality adjudicated and protected herein. We think the award of damages for which the judgment has been entered should be regarded as personal property. Had the city without authority, right, or license seized, trespassed upon, or injured the community realty, and had the husband and wife prosecuted to judgment, an action for the recovery of damages on account of any resulting injury to the property, or on account of its impairment in value, a judgment for such damages, when entered, would undoubtedly be personal property. Such a judgment could be collected and satisfied by the husband, who, under section 5917, Rem. & Bal. Code, would be entitled to its management and control with power of alienation. We see no reason why the judgment in this condemnation proceeding is not likewise community personal property.

Appellant, however, insists, that as one of the spouses of the existing community, she while living apart from her husband, is entitled to have her property rights adjudicated and

protected, by an order entered in this action. If, as she contends, she is necessarily and justifiably living separate and apart from her husband, on account of his wrongful acts, it is apparent that she could have all property rights to which she is entitled, or the matter of her separate maintenance determined, adjudicated and settled in an action for divorce, or in one for separate maintenance. If, as alleged, her husband intended to appropriate the judgment to his own use and deprive her of her community rights therein, she could prevent such wrongful acts on his part by invoking the equitable powers of the court in an action for divorce or separate maintenance. The allegations of her answer, if true, would, in a proper action and in the absence of any former adjudication, entitle her to a decree of divorce and a proper disposition of the community and separate property. It appears from the pleadings, however, that it has heretofore been adjudicated, in an action for divorce instituted by her, that she is not rightfully and necessarily living separate and apart from her husband, and that she is not entitled to a decree of divorce. The opinion of this court on the appeal pleaded by her husband is reported in *Stay v. Stay*, 53 Wash. 534, 102 Pac. 420. She cannot, in this condemnation proceeding, relieve herself from the effect of such former adjudication by formulating and tendering issues which should be tendered in an action for divorce or for separate maintenance, nor can she by any such procedure prevent her husband from exercising his legal right to collect and satisfy the judgment herein.

The judgment is affirmed.

Rudkin, C. J., Parker, and Mount, JJ., concur.

[No. 8841. Department One. August 26, 1910.]

In the Matter of the Petition of N. W. BOLSTER.[1]

DEPOSITIONS—ATTENDANCE OF WITNESS—PRODUCTION OF BOOKS—STATUTES. An officer authorized to take depositions may compel a witness to produce books and documents, under Rem. & Bal. Code, § 1216, providing that a witness may be compelled by a court to appear and bring with him books and documents, and § 1235, providing that an officer authorized to take depositions may subpoena a witness "in like manner as he may be subpoenaed and compelled to attend as a witness in any court"; and §§ 1236, 1237, providing the manner in which such a witness may be compelled to attend, without any mention of books or documents, were intended to make the other provisions effective, and not to restrict the power of the officer.

WITNESSES—PRIVILEGE—RIGHT OF PRIVACY—TRADE SECRETS—CORPORATIONS. The books of a corporation are not privileged from being produced in court on a subpoena *duces tecum*, on the ground that they are trade secrets, as a trade secret means an unpatented secret formula or process for compounding or manufacturing the article, and does not apply to merely private books or writings of a corporation.

Appeal from an order of the superior court for King county, Main, J., entered April 23, 1910, dismissing a proceeding to require a witness to produce documents on the taking of a deposition by a commissioner, after a hearing on the application. Reversed.

Farrell, Kane & Stratton and *Ira A. Campbell*, for appellant.

William H. Gorham, for respondent.

FULLERTON, J.—On March 5, 1910, the superior court of the state of California, in and for the city and county of San Francisco, in a cause pending therein, issued a commission authorizing and empowering one N. W. Bolster, a notary public of the state of Washington, residing at the city of Seattle, to take the depositions of E. J. Mathews and

[1]Reported in 110 Pac. 547.

one T. A. Davies, president and vice president, respectively, of a corporation known as the John J. Sesnon Company, and to require them to produce such books and papers of the corporation as should be in their possession or under their control, that the same might be examined touching the matters at issue in the cause mentioned. On the receipt of the commission, the commissioner caused a subpoena to be issued to the witness E. J. Mathews requiring the witness to appear before him at a certain time and place to testify pursuant to the commission, and also to bring and produce before the commissioner certain books, papers, and documents belonging to the John J. Sesnon Company. The witness obeyed the subpoena, in so far as to attend in person, but refused to bring in the books and other documents described in the subpoena. The commissioner thereupon applied to the superior court of King county asking that court to require the witness to attend before him with the documents mentioned. The court, however, after a hearing, refused to grant the application and dismissed the proceedings, on the ground that the documents sought were "trade secrets of the John J. Sesnon Company, and as such . . . privileged." This appeal is from the order of dismissal.

While the trial judge seems not to have rested his decision on that ground, it is contended in this court on behalf of the witness that the superior court was without authority to make the order requested. But without following the argument in detail, we are satisfied that the statutes are ample in this respect, even if it be conceded that the court has no such inherent power. By the code (Rem. & Bal. Code, § 1216), it is provided that a witness may be compelled to appear and testify before the courts of this state by means of a subpoena issued out of the court and served upon him, and the subpoena may require not only the personal attendance of the witness to whom it is directed, but may also require the witness to bring with him any books, documents, or things under his control. By another section it is pro-

vided that any witness may be subpoenaed to appear and give his deposition before any officer authorized to take depositions at any place within twenty miles of the abode of the witness, "in like manner as he may be subpoenaed and compelled to attend as a witness in any court." Rem. & Bal. Code, § 1235. The sections authorizing the court to compel the attendance of the witness before the commissioner are the following:

"Sec. 1236. The superior court shall have power to compel the attendance of witnesses, within this state, before notaries public, justices of the peace or any other person authorized by the laws of this state to take depositions in causes pending in any court of the state, or in any court of any other state, or in any court of the United States, or in any court of a foreign country.

"Sec. 1237. The officer before whom the deposition is to be taken in case of the refusal of any witness to attend or testify shall report to the superior court in and for the county in which the witness resides, or is found, by petition, that due notice has been given of the time and place of taking the depositions and that the witness has been summoned in the same manner that witnesses are now summoned to appear and testify in the superior court of this state; and the fees and mileage of the witness has been paid, or tendered to the witness, for his attendance and testimony, and that the witness has failed and refused to attend or testify before such officer, in the cause mentioned in the notice and the subpoena; and ask an order of the court compelling the witness to attend and testify before such officer."

It is argued that these sections may authorize the court to compel a witness to appear and give his oral deposition before the officer therein named, but do not authorize the court to compel the witness to bring with him books and documents under his control, no matter how pertinent or material to the inquiry such books and documents may be. But we think this a too narrow construction of the statute. Manifestly the sections quoted were intended to make effective the previous sections of the statute; and these, as we have seen, authorize

officers empowered to take depositions to issue subpoenas requiring the production of books and other documents.

The objection that the documents sought are privileged as trade secrets of the corporation seems to us to be equally without foundation. The term trade secret, as it is usually understood, means a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value. It is rarely, if ever, used to denote the mere privacy with which an ordinary commercial business is carried on. Yet it is in this latter sense the term seems to have been used in the finding of the trial court, as we find nothing in the record to indicate that anything more than such matters as are usually learned by the examination of the books of an ordinary business concern would be learned by an examination of the books of the corporation here in question. But a corporation, or other person keeping books, is not relieved from producing them, when they contain matters material to an issue, merely because they are private. A witness can be compelled to testify orally to private affairs connected with his business when material, and his books and documents stand on no higher plane. As was said in *Wertheim v. Continental R. & Trust Co.*, 15 Fed. 716:

"It may be inconvenient, and sometimes embarrassing, to the managers of a corporation to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeoparded, and the administration of justice thwarted."

See, also, *Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. 191; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241.

The order appealed from is reversed, and the cause re-

manded with instructions to enter an order requiring the witness to appear before the commission and produce the required documents, if they are within his control.

RUDKIN, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 8824. *En Banc.* August 26, 1910.]

CHARLES H. BELL, *Appellant*, v. SCRANTON COAL MINES COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS—STOCK—SALE OF SHARES — ESCROW — CONTRACT—TRANSFER OF TITLE. A contract identifying a certificate of 10,000 shares of corporate stock, placed in escrow, to be delivered to one of the parties on expiration of the escrow, and declaring it to be his property, is an acknowledgement, as between the parties, that the title thereto is in such party.

DAMAGES—PENALTY—FORFEITURE—CONTRACTS—CONSTRUCTION. A contract for the sale of 20,000 shares of corporate stock provides for a penalty or forfeiture, which will not be enforced in equity, where it provides that 50,000 shares of stock deposited in escrow by the vendors shall be received by the vendees in case the vendors do not pay certain debts of the corporation assumed by them, whether the vendees complete the purchase or not, that it was optional with the vendees to pay said indebtedness and receive the 50,000 shares, and that if they elected not to pay the debts and decided not to purchase the 20,000 shares they were to have returned to them the purchase money paid and also receive the 50,000 shares of the vendor's stock deposited in escrow; since the shares deposited in escrow to secure payment of the debts assumed by the vendors are to be forfeited by the defaulting party at all events regardless of the different degrees of importance of the several acts, thus making the stipulated securities in some instances too large.

DAMAGES—PENALTY—NOMINAL DAMAGES. In a controversy over the title to corporate stock claimed to be forfeited on violation of a penalty, only nominal damages will be inferred in the absence of proof of actual damages.

PLEADING—ANSWER—ADMISSIONS. Where a complaint alleges that corporate stock was worth seventy-five cents to one dollar per share, and the answer denies that its value exceeds five cents per share, the

[1]Reported in 110 Pac. 628.

value stated in the answer is not admitted and taken as true for want of any reply.

CHADWICK and FULLERTON, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 28, 1910, upon findings in favor of the defendants, in an action to recover corporate stock under an escrow agreement, after a trial on the merits before the court without a jury. Reversed.

Graves, Kizer & Graves, for appellant.

Danson & Williams, for respondents.

GOSE, J.—The defendants Brown, Brynton, and Reynolds, hereafter referred to as Brown, were, at the time of the making of the contract hereafter set forth in full, large stockholders in the defendant corporation, the Scranton Coal Mines Company, hereafter called the company. The company owned no property except a contract for the purchase of certain coal land from Bullock & Bullock, theretofore assigned to it by Brown. Payments were about to mature upon the contract, and the company had no funds with which to meet them. Thereupon Brown agreed to give the plaintiff 20,000 shares of the stock of the company, if he would raise $5,000 by a sale of its stock. Brown had theretofore entered into an agreement with the Bullocks whereby they agreed to sell, and Brown had agreed to buy, the coal property, and to pay therefor $34,000 and 41,600 shares of stock in a corporation to be organized, capitalized at $250,000, and divided into 250,000 shares of fully paid and nonassessable stock of the par value of one dollar each. The Bullocks agreed to execute a deed and place it in escrow, to be delivered to Brown upon payment of the purchase price of the property, time being made the essence of the contract. The plaintiff succeeded in interesting the defendants Robbins, Clodius, Turner and Turner, hereafter referred to as Robbins, in the

purchase of stock. Whereupon the following contract was executed by all the defendants except the bank:

"We, the Scranton Coal Mines Co., of Spokane, Washington, party of the first part, agree to sell and F. E. Robbins, C. H. Clodius, James Turner and W. L. Turner agree to buy 20,000 shares of stock of the said Scranton Coal Mines Co., a corporation. The parties of the second part, Turner, Turner, Clodius and Robbins, above named, agree to pay for the said stock the sum of $5,000, said sum to be paid as follows: $1,500 cash, $1,000 in ten days, $1,500 in thirty days and the remaining one thousand in sixty days. This stock is to be placed in escrow in the Exchange National Bank of Spokane, to be delivered to the parties of the second part under the terms of this agreement. It is further understood that if the parties of the second part shall have the right to investigate in every manner the property of this corporation, and the corporation will aid them in every way in so doing, and if, at the end of ten days, the representations of Engineer Reynolds, which are made a part of this agreement, are not found true, in every material part, then the parties of the second part shall not be compelled to pay anything further under this agreement and the party of the first part herein will return to them the fifteen hundred dollars already expended. At the payment of each sum specified herein, the Exchange National Bank shall deliver to the parties of the second part, stock of the value of 25 cents a share to the amount of the said payment.

"In consideration of this agreement, and the payment made hereunder, the party of the first part also gives and grants to the parties of the second part an option on 20,000 additional shares of stock at the agreed price of twenty-five cents a share. This stock is also to be deposited in the Exchange National Bank of Spokane, and the said bank is hereby authorized to deliver any part or all of the said 20,000 shares to the parties of the second part upon their depositing to the order on the said bank the said sum of twenty-five cents a share. This option extends to the first day of September, 1908, and all stock remaining in the said bank at that time is to be returned to the treasurer of the company.

"At the meeting of the stockholders held on the first day of May, 1908, the parties of the second part agree to stand

by and support Secretary and Treasurer Brown in granting this option.

"It is further understood and agreed that the company is at present indebted to Bullock & Bullock in the sum of $32,000. D. W. Brown, P. R. Brynton and H. I. Reynolds, who are to be hereinafter known as the parties of the third part, are granted and given by the company 35,000 shares out of the treasury stock of the said company. In consideration of the grant of this stock the parties of the third part agree to pay all of the indebtedness hereinbefore mentioned promptly when the same becomes due, which is as follows:

$ 7,500.00 October 1st, 1908.
$12,500.00 April 1st, 1909.
$12,500.00 April 1st, 1910.

"If these sums are not paid promptly at the times herein specified when the same becomes due, it is understood and agreed that the bank herein named shall deliver the same to the parties of the second part, and the parties of the second part agree to either pay all of the debts herein specified and release the company in full, or to deliver the said 35,000 shares of stock to the corporation. In addition to this, D. W. Brown and P. R. Brynton, who are the owners of 50,000 shares of the capital stock of the corporation, hereby agree to deliver same to the bank hereinbefore specified, and if they fail to pay the debts hereinbefore assumed by them, promptly, when the said debts become due, then the bank is authorized to deliver the said 50,000 shares to the parties of the second part, and the said parties of the second part shall become the absolute owners thereof."

Thereafter Brown delivered to the plaintiff 10,000 shares of the stock and informed him that the remaining 10,000 shares were in escrow with the defendant bank. Thereupon the following writing was executed by the plaintiff and Brown:

"This Agreement made and entered into this 11th day of April, A. D. 1908, by and between D. W. Brown, party of the first part, and Chas. H. Bell, party of the second part, both residents of the city of Spokane, Wash.

"Witnesseth, That the said D. W. Brown, party of the first part, hereby acknowledges that he is the owner of ten thousand (10,000) shares of the capital stock of the Scran-

ton Coal Mines Co., a corporation organized under the laws of the state of Washington; said party of the first part hereby agrees with the said party of the second part that the said ten thousand (10,000) shares of stock above mentioned is the property of the party of the second part; further, that said stock is now placed in escrow in the Exchange National Bank of Spokane, Wash.; the said party of the first part hereby agrees to place the above mentioned stock to the peaceful possession of the party of the second part upon the expiration of the escrow agreement which expires on the 31st day of March, 1910, or sooner if the said stock is released from escrow before that date."

The 50,000 shares of stock referred to in the tripartite agreement were owned equally by Brown and Brynton. When the writing last set forth was executed, plaintiff deposited it with the defendant bank as a part of the escrow created under the writing first quoted. Later Robbins paid for the 40,000 shares of stock, paid the Bullock indebtedness upon Brown's failure to pay it, received the 35,000 shares of stock referred to in the contract, and 40,000 of the 50,000 shares of stock deposited by Brown. At the trial the defendant bank deposited with the clerk of the trial court a certificate for 10,000 shares of stock standing in Brown's name to abide the result of the suit. Both the plaintiff and Robbins assert the right to the certificate, and the plaintiff instituted this action for its recovery. The contest is between the plaintiff and Robbins, Brown having defaulted. Judgment was entered awarding the stock to Robbins. The plaintiff has appealed.

The appellant first contends that the writing executed by Brown and himself is an acknowledgment, as between them, that the title to the certificate for the 10,000 shares of stock is in the latter; whilst the respondents contend that it cannot be so regarded. We think the appellant's view is sound. The stock has been paid for and the writing segregated and identified the certificate as the property of the appellant. *Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275.

The appellant next contends that the clause in the tripar-

tite agreement, whereby Brown deposited the 50,000 shares of stock in the respondent bank for delivery to Robbins in case Brown failed to pay the Bullock debt, is a penalty or a forfeiture. The respondents contend that "it was merely a part of the consideration for the contract," and that, if it is not so construed, it should be treated as liquidated damages. We think the appellant's view must be accepted. A reference to the contract first quoted will show, (1) that the indebtedness of $32,500 to the Bullocks was treated as the company's debt; (2) that Robbins was to receive the 50,000 shares of stock without regard to whether he paid either for the first 20,000 shares of stock or the Bullock indebtedness; (3) that it was optional with Robbins to pay or not to pay the Bullock indebtedness; and (4) that if Robbins exercised his option to not pay the Bullock indebtedness, and upon investigation found that "the representations of engineer Reynolds are not found to be true in every material part," and demanded and received the $1,500 as he had a right to do under the contract, then he would not have been a stockholder and Brown would have been penalized 50,000 shares of stock in his favor for failure to pay the Bullock indebtedness. Moreover, he would be penalized in the same sum if he made the first two payments and defaulted upon the whole or any part of the third payment, for the contract reads, "if they fail to pay the debts hereinbefore assumed by them promptly when the said debts become due, then the bank is authorized to deliver the said 50,000 shares to the parties of the second part [Robbins] and the said parties of the second part shall become the absolute owners thereof." So it will be seen that Robbins, under one contingency, although not a stockholder at all, would be invested with absolute ownership of 50,000 shares of Brown's stock without rendering any value for it. The clause is therefore a penalty, or, speaking with legal accuracy, a forfeiture. When the stipulation involves a liability for a larger sum of money only, it is a penalty; but if it involves the loss of chattels or security pledged, it is a for-

feiture. 1 Pomeroy, Equity Jurisprudence (2d ed.), § 436. Whether a penalty or a forfeiture, it will ordinarily be treated as security for the performance of the obligation of which it forms a part. Id., § 433.

"Whether an agreement provides for the performance or nonperformance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty and not as liquidated damages." Id., § 444.

It is one of the maxims of equity that equity will not enforce a forfeiture. Id., § 459. The nature of the act to be performed and the consequences which naturally result from its violation, and all the circumstances surrounding the transaction must be considered together in determining whether the stipulation is a penalty, a forfeiture, or one for liquidated damages. "If upon the whole agreement the court can say that the sum stipulated to be paid was intended to be a penalty," the court will so treat it, without regard to how the parties have designated it. *Id.*, § 440. The following cases are illustrative of our view: *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. 415, 50 Am. St. 871, 28 L. R. A. 676; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729; *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12, and *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165.

In *Krutz v. Robbins* a provision in a mortgage that, in case of default in the payment of interest or taxes, the interest rate being seven per cent payable semiannually, the mortgagors would pay interest at the rate of twelve per cent per annum compounded semiannually from the date of the note to the time of actual payment, was held to be a penalty. In *Johnson v. Cook* a bond conditioned for the payment of $3,000 if the obligors failed to erect a house upon certain property within a fixed time of the value of $2,000, and to pay all liens arising therefrom, was held to be a penalty. In

McDaniels v. Gowey a bond conditioned for the payment of $9,000 if the obligor failed, within six months from the date of the bond, to pay a mortgage for $4,000, taxes amounting to $19.40, and to secure the release of a right in a third party to cut timber upon the mortgaged premises, was held to be a contract of indemnity only. In *Madler v. Silverstone*, in discussing the distinction between liquidated damages and a penalty or forfeiture, we said:

"If the principal agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and the stipulated sum is to be paid on the violation of any or all of them, and the sum will in some instances be too large, or if from an examination of the written agreement it is uncertain whether it was the intent of the parties that the stipulation was intended as liquidated damages, or as a penalty, it should be treated as a penalty."

"A penalty is a punishment imposed by law or by contract for doing or failing to do something that it was the duty of the party to do." *Haskins v. Dern*, 19 Utah 89, 56 Pac. 953.

In the absence of proof of actual damages, the law will infer nominal damages only. *Lee v. Carroll Normal School Co.*, 1 Neb. (Unof.) 681, 96 N. W. 65; *Johnson v. Cook*, *supra*. The record is silent as to damages, the respondents' position being that the contract gives them full title to the stock in controversy.

The complaint alleges that the stock is worth seventy-five cents or a dollar per share, and the answer denies that it is worth to exceed five cents per share. The respondents contend that, under the pleadings, in the absence of any evidence as to its value, the value stated in the answer must be accepted as true, citing *Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106. That case holds that a judgment upon the pleadings can be entered only for the amount admitted to be due in the answer. It is not authority for the respondents' contention. Indeed, upon the issue the suggestion is more novel than sound. However, upon the issue before us, the

value of the property is probably immaterial. While we have said that a penalty is ordinarily treated as a security, in this case we think that principle has no application. The debt for the nonpayment of which Brown was penalized has been paid, and the company, the actual debtor, has been discharged from liability. Moreover Robbins already holds 40,000 shares of the stock. We do not think that it was intended that the stock deposited by Brown should stand as security for the payment of the indebtedness by Robbins. The contract is peculiar in several respects. It will be noticed that Robbins purchased the first 40,000 shares at twenty-five cents a share, and that the price fixed for the 35,000 shares was nearly a dollar per share. There is nothing in the contract which explains this inconsistency. However, it appears from the contract as an entirety that the clause requiring Brown to deposit the 50,000 shares of stock was a penalty or a forfeiture, and as such we have seen it is unenforcible.

The decree is reversed, with directions to enter a decree for the appellant for the 10,000 shares of stock evidenced by the certificate filed with the clerk of the court.

RUDKIN, C. J., MORRIS, MOUNT, PARKER, and DUNBAR, JJ., concur.

CHADWICK, J. (dissenting)—The majority has made an exceedingly difficult case out of what seems to me to be a very simple one. Taking the contract as a whole, its meaning is plain, and there can be no doubt that the judgment of the lower court is right. Brown was, or at least played the part of what is known as, a "promoter"; one who puts an enterprise in motion and grabs what he can as it passes by. So far as the record shows, he was without means. He had contracted to purchase certain mining property, and had agreed to pay Bullock & Bullock $32,000, the remainder of the purchase price, at the times mentioned in the contract exhibited in the majority opinion. To meet this engagement he followed the usual custom of promoters. He organized a

corporation, and into this he induced his friends Robbins *et al.* to put $5,000, and caused the company to assume his debt of $32,000.

The tripartite agreement provides that, in consideration of the grant of 35,000 shares of stock, Brown and his associates would pay the $32,000. They had no present means with which to meet this obligation; and Brown further agreed that, in case he and his associates failed to pay the purchase price of the property, and the other parties did, that they should have the 35,000 shares and 50,000 shares of their individual stock which Brown and Brynton caused to be deposited in the Exchange National Bank to insure its delivery. When it is considered that, at the time the contract was made, Robbins *et al.* were paying 25 cents per share for the stock, it is not unreasonable—in fact, it is the natural deduction from the premise—that, in the event they were called upon to pay out the $32,000 to protect the property, they should receive an amount of stock which in some degree would approximate the amount of money they had advanced. The agreement was not a *nudum pactum;* for Brown, notwithstanding the fact that the company had assumed his debt, was to be relieved of his obligation. It was still his debt so far as Bullock & Bullock were concerned. The assumption that Robbins *et al.* would receive the 50,000 shares in any event whether they paid the purchase price or not, and that the stipulation therefore operates as a forfeiture, may be disposed of in two ways:

First, Brown had a right to assume that Robbins *et al.* would pay the $32,000 which, notwithstanding the argument of the writer of the majority opinion, furnished the basis of their right to the 50,000 shares. They had paid all that had been put into the company, and Brown made his contract on the theory that they were able to pay the purchase price, and would pay it in case he did not do so. But this point, and it is this point on which the majority opinion turns, is not in the case. The fact is, they *did* pay it, and

the premise of the court's opinion could only be based upon the proposition that they were claiming the 50,000 shares without having paid the $32,000.

Second, there can be no forfeiture. It is fundamental that a forfeiture cannot occur unless a party is deprived of something. He must have something to forfeit. Brown had nothing to give up; his stock represented nothing; he had not put a dollar in the company; his interest was a chimerical hope that he might induce others to pay the purchase price, and thus clear and possibly make the remainder of his "promoter's stock" of some value; or if none was left he could step out with hope deferred but without loss of money. The agreement to surrender the 50,000 shares was by way of compensation to Robbins *et al.* in the event they were forced to pay the purchase price of the property to protect the investment of $5,000 which Brown had induced; and was not, and should not, under the facts of this case, be tortured into a penalty. If the stock of the company were the inducement of the contract, it is only fair to presume that Robbins *et al.* would, as business men, have taken it up at 25 cents per share rather than assume the risk of paying nearly a dollar a share. This the decision of the court binds them to do.

Robbins *et al.* knew nothing of plaintiff's claim that Brown's stock had been assigned to him, and should not therefore be bound by any deals between Brown and plaintiff. I know of no rule of law or equity, or even good morals, that would preserve to Brown or his assignee an equity in a property into which he had induced his friends to invest, when, in order to protect their original investment, they were compelled to secure the title to the property which he had guaranteed and without which their original investment would be a total loss.

The result of our decision is that Brown, who put in nothing and even failed to secure title to the property, takes out of his investment of nothing and the breach of his contract

10,000 shares of stock. The 35,000 and the 50,000 shares represent, and in law is, *pro rata*, the property itself, and the men who pay for the property should receive the stock; otherwise they have paid for something they have not received. I therefore dissent.

FULLERTON, J., concurs with CHADWICK, J.

[No. 8984. *En Banc.* August 29, 1910.]

THE STATE OF WASHINGTON, *on the Relation of E. V. Lambert et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *et al., Respondents.*[1]

MUNICIPAL CORPORATIONS—FORMATION OF CHARTER—ELECTIONS—TIME FOR HOLDING—DISCRETION—STATUTES. An election to choose fifteen freeholders to prepare a new city charter for cities of the first class, under Rem. & Bal. Code, § 7498, must be called by the city council within a reasonable time after due petition therefor is filed, in view of the failure of the statute to fix the time, and of § 7499, requiring the proposed charter to be submitted at an election to be called "immediately"; hence, the provision of § 7502 that the election may be general or special only vests in the council a discretion to fix upon the next general election in case the same is to occur within a reasonable time.

SAME—ABUSE OF DISCRETION—MANDAMUS. Where a city council is petitioned on May 24th to call an election to choose fifteen freeholders to prepare a new city charter, under Rem. & Bal. Code, § 7498, it is an abuse of discretion for the city council to fix the date therefor upon the next general election to be held on the first Tuesday of May, 1911; and mandamus lies to compel the council to fix upon a reasonable time.

SAME—TIME FOR HOLDING—ELECTION—COURTS—POLITICAL QUESTION. The question of the necessity of holding an election to choose freeholders to frame a city charter at an earlier time than one year in the future, is usually a political question not susceptible of proof in a court.

Certiorari to review a judgment of the superior court for Spokane county, Sullivan, J., entered July 23, 1910, grant-

[1]Reported in 110 Pac. 622.

ing a peremptory writ of mandamus commanding a city council to call a special election, after a hearing on the merits. Affirmed.

Fred B. Morrill and *V. T. Tustin*, for relators.

Munter & Lovejoy, *A. E. Gallagher*, *H. L. Kimball*, *Adolph Munter*, *John E. Blair*, *H. M. Stephens*, and *John M. Gleason*, for respondents.

RUDKIN, C. J.—Section 7498, Rem. & Bal. Code, provides that:

"Upon the petition of one-fourth of the qualified electors, as shown by the last general city election, of any city of the first class, the city council of such city shall, and without such petition the city council in joint session may, cause an election to be held at which election shall be chosen by the qualified electors of said (city) fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to commence within ten days after their election, and within sixty days thereafter prepare a new charter for said city by altering, revising, adding to or repealing their existing charter, together with any amendments thereto, and file the same with the city clerk."

The next section provides that the new charter shall be submitted to the qualified electors of the city at an election to be *immediately* called therefor. Section 7502, Id., provides that, "Said elections may be general or special elections and, except as herein provided, shall be governed by the law regulating and controlling general or special elections in said city."

On the 24th day of May, 1910, a petition to the city council of the city of Spokane was filed with its clerk, wherein more than one-fourth of the qualified electors of the city, as shown by the last city election, petitioned the city council to cause a special election to be held at a date not more than thirty days after the filing of the petition, for the purpose of choosing fifteen freeholders to prepare a new charter for the city in the manner provided by law. It appears from the

return to the alternative writ of mandamus, issued by the court below, that the city council challenged the sufficiency of the signatures to this petition; but it nevertheless, of its own motion, adopted a resolution providing for the election of the fifteen freeholders, at the next general city election to be held on the first Tuesday of May, 1911. Certain of the petitioners thereupon applied to the court below for a writ of mandamus to compel the city council to call the election petitioned for within one month from the date of the writ.

The alternative writ was issued, commanding the city council to immediately order an election to be held within two months from the date of the writ, or show cause why it should not do so. A final hearing was had on the return to the alternative writ, and a peremptory writ was issued commanding the city council to forthwith order a special election, as prayed for in the petition, to be held not later than October 1, 1910. The court below denied an application for a supersedeas pending an appeal from its decision, and in view of the fact that the date fixed for the election will have passed before an appeal can be heard in this court, the record has been brought before us by a writ of review, and the cause is now here for final decision. While the sufficiency of the signatures to the petition for the calling of the election was denied in the return to the alternative writ, the legal sufficiency of that petition, in both form and substance, was admitted at the hearing in the court below, and in argument before this court.

On the foregoing facts, the following propositions will, we think, be conceded: First, that the duty of the city council to call the election follows as a matter of course from the presentation of a sufficient petition. *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609. Second, that if the date for the election is not fixed by statute, it must be called and held within a reasonable time. Third, that if the statute fails to designate or fix the time for holding the election, some discretion is necessarily

vested in the city council in that regard. Fourth, that if there is a clear and manifest abuse of that discretion, the courts will control the action of the city council by mandamus.

The section of the statute which provides for the election of the fifteen freeholders simply provides that the city council shall cause an election to be held, without more, and if this section stood alone, the rule requiring the city council to call the election within a reasonable time would prevail. Section 7502 provides that such elections may be general or special elections, and if these two sections stood alone we would feel constrained to hold that the latter section vested in the city council an absolute discretion to submit the question at the next ensuing general election to be thereafter held. But the difficulty with this construction is that § 7502 applies to the election for the adoption of the new charter, to be held pursuant to § 7499, as well as the election to choose the fifteen freeholders, and the latter section expressly provides that the election for the adoption of the charter shall be called *immediately*, so that we are convinced that the legislature did not intend to vest an absolute discretion in the city council in this matter. We are rather of opinion that § 7502 is permissive in its character. It might well be inferred from the preceding sections of the statute that the elections provided for must all be special, and this section was for the purpose of permitting such elections to be held as a part of the general city election, rather than for the purpose of fixing a date for the election.

Any other or different construction might lead to the following results: The election for the choice of freeholders is put off almost a year, or until the next general election, and for the like reason, or for no reason at all, the election to adopt or ratify the charter might be put off until the next general city election or for two years longer. We are convinced that the legislature did not intend any such consequence as this. In other words, we are of the opinion—as

was the court below—that the elections provided for must be held within a reasonable time, and may be general, if a general city election is to be held within a reasonable time thereafter; but otherwise, they must be special. We are further of opinion that the election was not called within a reasonable time, and that the city council abused the discretion vested in it by law. Only two cases were cited in argument bearing upon the general question under consideration. A statute of Illinois provides that:

"Any town in this state, incorporated either under any general law for the incorporation of towns, and acts amendatory thereof, or under any special act for the incorporation of any town or village, may become organized as a village, under this act, in the manner following: Whenever any thirty voters in such town shall petition the president and trustees thereof to submit the question, whether such town will become organized as a village, under this act, to the decision of the legal voters thereof, it shall be the duty of such president and trustees to submit the same accordingly, and to fix a time and place within such town for holding such election, and to appoint the judges to hold such election, and to give notice of the time, place and purpose of such election by causing at least five notices thereof to be posted in public places in such town, for at least fifteen days prior to holding such election."

A petition under this act was presented to the president and trustees on the 16th day of July, 1874, and an election was called for the first Tuesday in April, 1875. In *Village of Glencoe v. People*, 78 Ill. 383, the court held that this was a manifest abuse of discretion on the part of the municipal officers, and affirmed a judgment awarding a peremptory writ of mandamus compelling them to call the election for an earlier date. In the course of its opinion the court said:

"The change desired to be effected in the municipal government of the village, through an election, was such as materially affected every citizen and taxpayer of the village. The petition was based on what were supposed sufficient reasons, having reference to the *then existing* state of affairs. If reform, to be brought about through this means, was needed,

and desired by a majority of the voters of the village, it was a wrong and an outrage that they should be compelled to submit to the evils they labored under, for another year, when the change might reasonably be effected within a month. If there were leeches on the treasury, a vicious revenue system, imperfect police regulations, in the opinion of a majority of the voters, to be gotten rid of only through change in the organic law, they were entitled to have the change made as soon as it was practicable, and every day they were forced to submit to the continuance of the evils beyond that period, was so much arbitrary oppression by the council.

"We can imagine no public necessity justifying the postponement of the election from the 16th day of July, 1874, to the first Tuesday of April, 1875. It has every appearance of an attempt, on the part of those filling the council, to perpetuate their own power to the utmost possible period, notwithstanding and in defiance of the wishes of the people. It is not admissible that this conduct shall be excused by the respondent assuming that a majority of the electors did not concur with the thirty petitioners, and therefore the election would have involved the village in useless expense. That was the question to be settled by the election, and it could in no other way be settled. The law gave the thirty electors the right to have the election, and to have it within a reasonable time, and its unnecessary postponement was in violation of that right."

The only difference between the statute there construed and our own lies in the fact that our statute provides that the elections may be general or special, but for reasons already stated we do not think that this latter provision is controlling. In *Lubliner v. Alpers*, 145 Cal. 291, 78 Pac. 722, the supreme court of California held that the board of supervisors of the city and county of San Francisco were vested with full discretion to order a special election, or to wait until the next general election, to submit certain questions under a provision of the constitution of that state, but the case is not in point here, for we are convinced from a consideration of the act in question that our legislature intended otherwise.

The relators complain that no proof was offered tending to show a necessity for calling the election at an earlier date, and that the court rejected proof offered by them tending to show the reasons which prompted them in deferring the matter until the next general city election. The nature of the proof thus referred to is disclosed in affidavits filed before us in support of and in opposition to an early hearing in this court. The questions thus presented are purely political. The one-fourth or more of the electors who signed the petition calling for an election were doubtless of the opinion that an early election should be held, while perhaps an equal or even greater number may entertain a different view. But the question of the necessity for changing a municipal charter is usually a political one, upon which opinions will differ, and, as a rule, is not susceptible of proof in a court of justice. Such was the case here.

Finding no error in the record, the judgment is affirmed; and in view of the necessity for giving immediate notice of the election, the remittitur will issue forthwith.

PARKER, CHADWICK, FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 8665. Department One. September 2, 1910.]

KENNETH McLEOD *et al.*, *Respondents*, v. JOEL W. RUSSELL, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—STRIKING ANSWER. Error in striking an affirmative defense in an answer is harmless where the court ruled that the defense was fully presented by the denials in the answer and allowed the parties to show the facts.

LANDLORD AND TENANT—LIEN ON CROPS—STATUTES—REAL AND PERSONAL PROPERTY. Under Rem. & Bal. Code, § 1188, providing that a landlord shall have a lien on the crops grown upon the demised land for the rents accrued and accruing and "for the faithful performance of the lease," a landlord's lien for rent may be enforced upon crops under a lease renting both real and personal property, where the personal property was a span of horses and work harness

[1]Reported in 110 Pac. 626.

leased to be used on the premises in carrying on and conducting the place during the term.

SAME—RENT—ACTION—DEFENSES. The entire rent is not forfeited by failure of the lessor to deliver all of the leased property at the time agreed upon, as it could only defeat a recovery of the rent *pro tanto*.

SAME—LIEN ON CROPS—TIME FOR FILING LIEN—STATUTES. Under Rem. & Bal. Code, § 1190, providing that a landlord's lien on crops for rent shall be filed within forty days after the expiration of each year of the lease, a lien may be filed after the rent has accrued not later than the time fixed, and is not void as premature because filed before the expiration of the year.

SAME—RENT—DEFENSES—EVICTION. An entry made by a third person with the consent of the lessee does not amount to an eviction, avoiding the payment of rents, merely because the landlord also consented to the entry.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered April 30, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a landlord's lien for rent. Affirmed.

G. C. Waugh (*J. W. Russell*, of counsel), for appellant.
Thomas Smith and *Augustus Brawley*, for respondents.

FULLERTON, J.—The respondents, being the owners of a farm situated in Skagit county, leased the same to the appellant for a period of three years from and after January 1, 1908, at an annual rental of $1,000, payable on the first days of January and November in each year. The first installment of rental for the year 1908 was paid at the time the lease was executed. The lessee, however, defaulted in the second installment, and on November 10, 1908, the landlord filed a lien on the crops grown on the leased land during the year 1908, to secure its payment. The present action was begun to foreclose the lien. The complaint filed was the ordinary complaint in such cases. The answer of the defendant, after certain denials, contained three affirmative defenses, the first of which was a plea to the effect that the rent

reserved in the lease was nonlienable under the statute, inasmuch as the rent was reserved in one sum without segregation for the rental of both real and personal property, while the statute allowed a lien for rentals of real property only; the second separate defense set up the fact that all the property included within the lease was not delivered to the lessee at the time agreed upon; and the third set up an eviction of the appellant by the respondents from a part of the leased property. A motion to strike the affirmative defenses was granted as to the first defense, but denied as to the remainder. To the second of the affirmative defenses a demurrer was interposed and sustained, and the third was put in issue by a reply. The parties then went to trial on the issues formed by the denials, which resulted in a decree foreclosing the lien.

It is first assigned that the court erred in striking from the answer the affirmative defense relating to the nonlienability of the rent reserved in the lease. In the form in which this defense was pleaded, inasmuch as it alleged in general terms only that lienable and nonlienable items were included in the rent reserved, it was probably error to strike it from the answer, but the question is of no moment on this appeal. The court ruled that the issue sought to be presented by this affirmative answer was fully presented by the allegations of the complaint and the denials in the answer, and allowed the parties to show the facts as they actually existed. No prejudice, therefore, resulted from the ruling.

On the merits of the question suggested by the plea, it was shown that the lease, after a description of the land covered thereby and a recital of the rent reserved and the manner in which it should be paid, provided that the "first parties are to also lease unto the second party one span of horses and work harness for the said term of this lease . . . to use said team on said premises or in carrying on and conducting the said place for the said term." It is the quoted proviso that is thought to destroy the right of lien. The argument is that the statute gives a lien on the crops grown on the leased

premises for the rent of the land only, and not for rent accruing from a lease of personal property; and since the lease in question covers both real and personal property and reserves a lump sum as rental without specifying the amount separately reserved for either, the entire sum is nonlienable because of the inability to separate the lienable part from the nonlienable. But this argument, we think is founded on a misconstruction of the statute.

Our statute relating to landlord's liens, it will be remembered, provides not only that every landlord shall have a lien upon the crops grown or growing upon the demised lands of any year for the rents accrued or accruing for such year, but provides also that he shall have a lien on such crops "for the faithful performance of the lease." Rem. & Bal. Code, § 1188. It may be that were a lease to be made of both real and personal property, in which the personal property had no connection with the real property and was to be used independently thereof, the statute is not sufficiently broad to permit the landlord to enforce a lien on the products of the farm for the rental accruing from the entire property leased; but where, as in the case at bar, the personalty is suitable and necessary for the successful cultivation of the farm, and is leased to be used thereon for that purpose, we think it clear that the lien may be enforced for the entire rental reserved under this particular clause of the statute, even if it could not be so enforced under the general provision. The statutes under consideration in the cases cited from other jurisdictions do not contain the particular clause found in our statute, and hence cannot be considered as authority for determining what is lienable under our statute.

The matters alleged in the second affirmative defense did not constitute a defense to the respondents' cause of action. A failure on the part of the landlord to put the lessee in possession of all the leased property might defeat recovery of the rent reserved *pro tanto*, but it is not ground for an en-

tire forfeiture, and since no deduction in the rent was asked because of the failure, the plea was demurrable.

The statute (Rem. & Bal. Code, § 1190), provides that any landlord desiring to claim a lien for rents on the crops grown on the demised premises "must, within forty days . . . after the expiration of the term, or after the expiration of each year of the lease, for which any lands were demised" file for record with the county auditor a claim, etc. It will be observed that the lands in the case before us were demised for a term of three years, commencing with the first day of January, 1908, at a rental of $1,000 per year, payable on the first days of January and November of each year; that the rental for which the present lien was filed fell due on the first day of November, 1908, and that the lien was filed on the tenth day of the same month. The appellant contends that the lien is void under the statute because prematurely filed. Cases are cited from other jurisdictions which seemingly maintain the position that under such a statute the lien can only be filed during the time between the end of the year of the lease and the statutory period, in this instance forty days, but we have laid down a contrary rule when construing a similar statute, holding, in effect, that the lien might be filed at any time after the right of lien accrued, if not later than the time limited in the statute. *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158. The principle of this case concludes the question at bar against the contention of the appellant. We are aware that the appellant asks that the case be overruled as contrary to the weight of authority, but we think it is just in principle, and within the spirit of the statute, and prefer to follow it rather than follow the more harsh rule of the cases to the contrary.

Finally, the appellant contends that no recovery of the rents can be had because, as he claims, he was evicted from a part of the demised premises. But as to this claim we cannot agree with the appellant on the fact. There was no eviction, partial or otherwise. The entry made by the third person,

which he claims to be such, was made with his consent, and he cannot be heard to call it an eviction for the purpose of evading the payments of his rents merely because the landlord also sanctioned the entry.

There is no error in the record, and the judgment will stand affirmed.

RUDKIN, C. J., MORRIS, GOSE, and CHADWICK, JJ., concur.

[No. 8666. Department One. September 3, 1910.]

H. F. PROVINE, *Appellant*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—INJURY TO ABUTTER—LIABILITY OF CITY. Where a city condemned the right to fill lots to a slope of one and one-half feet for each foot of elevation to support the grade of a street, it is liable for injury to a building by the placing of more dirt in the space than was necessary to make the required slope.

SAME—ACTS OF CONTRACTOR—LIABILITY OF CITY. Evidence that such grading was undertaken by the city and the fill made by the persons having charge, is sufficient to fix the liability of the city, in the absence of a showing by the city that the work was done by independent contractors not under the city's supervision or control.

SAME—INJURY TO ABUTTER—EVIDENCE—SUFFICIENCY. In an action for injury to a building, pushed off its foundations, by filling in more dirt than was necessary to make a required slope, evidence that sixty cubic yards more than was necessary was used, raising the dirt against the building four feet more than it should have been, is sufficient to make a question for the jury and sustain a verdict for the plaintiff.

SAME—CONSENT OF ABUTTER—EVIDENCE—QUESTION FOR JURY. In an action against a city for injury to a building by a fill, upon an issue as to whether plaintiff consented, a question for the jury is presented by the plaintiff's denial of the testimony of the defendant's witnesses.

Appeal from a judgment of the superior court for King county, Gay, J., entered November 2, 1909, in favor of the

[1]Reported in 110 Pac. 619.

defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property by reason of the regrade of a street. Reversed.

John P. Hartman, for appellant.

Scott Calhoun, Ralph S. Pierce, and *C. B. White*, for respondent City of Seattle.

Jas. A. Snoddy, for respondents Hawley & Lane.

FULLERTON, J.—On April 19, 1906, the city of Seattle, by ordinance duly enacted, directed certain of its streets to be regraded, among which was a street known as Stewart street. The plan and specifications for the regrade called for a dirt fill on Stewart street, where it passed the northerly side of lot four, in block six, of Sarah A. Bell's addition to the city of Seattle, of some eighteen feet at the northeast corner and sloping downward to twelve feet at the northwest corner. To hold the fill in place, the plans provided for an enbankment with a slope of one and one-half feet laterally to one foot in height, extending over onto private property. This permitted the fill to extend laterally on the property above described a distance ranging from eighteen to twenty-seven feet. To acquire this right, condemnation proceedings were begun by the city, and a *lis pendens* filed with the county auditor. On April 19, 1907, and after the action last mentioned had been begun, the appellant, Provine, leased the lot described, from its owner, for a term of years, and asked and obtained from the city of Seattle a permit to construct a two-story wooden building thereon, fifty-three by one hundred and twenty feet in size, covering the entire lot, save a strip seven feet wide extending across its northerly side next to the fill. He thereupon constructed a building according to the permit, and occupied it in the conduct of his business of buying and selling lumber.

Judgment in the condemnation suit was entered on June 29, 1907, and thereafter the city of Seattle let a contract to the respondents H. W. Hawley and L. C. Lane to perform

the work of regrading the streets. The nature or terms of the contract, however, do not appear in the record. The contractors entered upon the performance of the work, and in the course thereof filled the street in front of the appellant's building, but instead of allowing a slope of one and one-half to one for the retaining wall, they filled the entire space between the building and the street to a level with the street, plus one and one-half feet in addition to allow for shrinkage, letting the earth rest for its support against the wall of the appellant's building. Immediately on the completion of the fill, the house slid from its foundation, partially wrecking it, and rendering it unfit for use. The appellant conceived that the wreck of the building was caused by the excessive quantity of filling material the contractors had placed in the seven foot space, and brought the present action against the city and the contractors to recover therefor, laying his damages at two thousand eight hundred ninety-two and fifteen hundredths dollars. The city and the contractors took issue on his complaint, and a trial was had before the court sitting with a jury, which resulted in a verdict in the appellant's favor in the sum of sixteen hundred ninety-two and fifteen hundredths dollars. The city and the contractors thereupon moved for judgment notwithstanding the verdict. This motion the court granted, entering a judgment to the effect that the appellant take nothing by his action, and that the defendants recover their costs. This appeal was taken therefrom.

The appellant admits that, in virtue of the condemnatory action brought by the city against his lessor, the city had the right to overflow the lot with earth sufficient to form a sloping enbankment one and one-half feet in width at the bottom for each foot of elevation to which the street was filled, and that since he erected a building within this zone, he was obligated to make it of sufficient strength to resist the pressure of the filling material up to the amount the city was lawfully entitled to place thereon. But he contends, and we think justly, that the city had no right to put more dirt in

the space than was necessary to make the required slope; that it had no right to fill the space between his building and the street line up to the level of the street, and that if it did so, and this extra fill caused the wrecking of the building, it is liable to the appellant therefor.

The city urges its nonliability for three several reasons: first, because there is no evidence in the record showing that the city ever authorized the contractors, Hawley & Lane, to deposit more dirt between the street line and the appellant's building than was permitted by the judgment in the condemnation suit; second, because there is no evidence introduced at the trial which would authorize the jury to find that the additional dirt caused the injury complained of; and third, that if any such additional dirt was deposited in the space mentioned, it was so deposited at the appellant's direction and request.

With reference to the first objection, the appellant was not obligated to show any express direction from the city to Hawley & Lane directing them to fill this particular space, before he could charge the city with responsibility for an injury arising therefrom. It was enough when he showed that the work of grading the streets was an undertaking of the city, and that in the course of the work the fill was made to his injury by the persons having charge of the work. The city might have escaped liability by showing, if such were the fact, that the persons making the fill were independent contractors, and that the work was not under its supervision or control, further than it had the right to exact that certain results be obtained. *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6. But it made no such showing. The fact was neither alleged nor proved. On the contrary, the proofs tended rather to show that the contractors were working under the immediate direction of the city than as independent contractors. The rule is that a city when acting in its private capacity, as distinguished from its public functions and duties, is liable, to the same extent as a private cor-

poration or individual, for the wrongful acts of its agents and servants committed while acting within the apparent scope of their authority. *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. 825; *Normile v. Ballard*, 33 Wash. 369, 74 Pac. 566; 28 Cyc. 1257.

With reference to the second objection, the evidence tended to show that the quantity of earth placed in the fill, over and above that allowed by the judgment in the condemnation proceedings, amounted to some sixty cubic yards; that the effect of the fill was to raise the height of the dirt against the wall of the building four feet more than it would otherwise have been; and that the building was pushed off its foundation immediately on the completion of the fill. This we think was sufficient evidence as to the cause of the injury to require the submission of the question to the jury. It may be that, had the jury found the other way, the court would not disturb the verdict, but the facts shown amount to more than a scintilla of evidence that the wreck of the building was caused by the wrongful additional fill, thus making the question one of fact for the jury, rather than one of law for the court.

As to the third objection, it is a disputed question whether or not the appellant authorized or consented to the making of the additional fill. The respondents' witnesses testified that he did, but the appellant as emphatically denies it, and says that he protested against it rather than consented to it. This also presents a question for the jury and not the court.

The brief on the part of Hawley & Lane suggests only questions of fact. These are sufficiently answered by what we have said concerning the objections suggested by the city, and need no further consideration here.

We conclude, therefore, that there was no legal reason for denying the appellant the right to recover; that on all the material questions of fact he made a case for the consideration of the jury, and was entitled to have the benefit of their judgment upon them.

The judgment is reversed, and the cause remanded with instructions to reinstate the case, overrule the motion for judgment notwithstanding the verdict, and proceed further with the cause as the due administration of justice may require.

Rudkin, C. J., Morris, Chadwick, and Gose, JJ., concur.

[No. 8723. Department One. June 3, 1910.]

John J. Coffey *et al.*, *Appellants*, v. Seattle Electric Company, *Respondent*.[1]

Appeal—Preservation of Grounds—Exceptions to Instructions—Method of Taking. The amendatory act of 1909, Rem. & Bal. Code, § 339, providing that exceptions to instructions may be taken at any time before the hearing of a motion for a new trial, merely changed the time for making the same and not the method; and exceptions not stated to the trial judge and noted in the minutes or embodied in the record, as required by Rem. & Bal Code, § 384, but merely filed in writing without being called to the court's attention, are unavailing and cannot be considered on appeal.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 15, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries. Affirmed.[2]

Heber McHugh and *John T. Casey*, for appellants.

James B. Howe, *A. J. Falknor*, and *I. N. Miller*, for respondent.

Morris, J.—Action for personal injuries, judgment upon verdict for defendant, and plaintiff appeals. We are met at the outset of this case by respondent's motion to affirm the judgment, for the reason that the record shows no proper and sufficient exceptions were taken to the errors assigned, and

[1]Reported in 109 Pac. 202.

[2]Note: Withheld from publication pending rehearing.—Rep.

upon which a reversal is asked, all of which relate to instructions given by the court, save one in which error is based upon the court's refusal to give a requested instruction. The trial was had on December 21, 1909, the jury returning a verdict for respondent. On December 23 appellants made a motion for a new trial, which was denied on February 18. On January 18 appellants filed exceptions to certain instructions given by the court and to its refusal to give others, and on January 29 filed additional exceptions of the same nature. Neither of these files appears to have been served on counsel for respondent, nor does it appear that they were ever called to the attention of the trial judge. They are not included in the statement of facts and certified to by the trial judge, but appear in the transcript among other matters of record.

Under the old trial procedure, as found in Rem. & Bal. Code, § 384, exceptions to instructions given, or offered and refused, were taken by stating the same to the court after the jury had retired and before return of verdict, specifying by numbers of paragraph or otherwise the parts of the charge excepted to and the requested instruction the refusal of which was excepted to; whereupon the judge noted the exception in the minutes or caused the stenographer to make a note of them. The evident purpose of this requirement was to call any alleged error to the court's attention, in order that it might, if convinced of its error, recall the jury, and make such correction as it deemed proper and necessary, and thus obviate the necessity for granting a new trial because of such error; the rule of appellate procedure being that the trial judge should have opportunity to correct all errors alleged to have been made, before the same could be relied upon for review in this court. Laws 1909, page 184, ch. 86, Rem. & Bal. Code, § 339, amended Bal. Code § 4993, by providing that the charge of the court should be in writing and given to the jury prior to the argument of counsel; the jury then being permitted to take the written instructions with

them into the jury room. The last sentence of this 1909 act reads as follows:

"Either party, at any time before the hearing of a motion for a new trial may except to the instructions given by the court, or any part thereof."

This act, neither by its express terms nor by its language, attempts to change the method of taking such exceptions, its only reference to exceptions being as to the time in which they may be taken; whereas, under the old procedure they should be taken before the return of the verdict, it is now proper to take them at any time before the hearing of a motion for a new trial, giving to the trial judge the opportunity to correct any error it may have made in its instructions in its ruling upon the motion for a new trial, and thus, as under the old procedure, save the necessity for review by appeal. The manner of taking exceptions in this particular being in no wise referred to in the amendment of 1909, we must look to the old procedure for the correct method. They must still be taken by stating the same to the trial judge, and by him noted in the minutes of the court or embodied in the record of the cause by the stenographer taking such record. Otherwise they are not proper exceptions and of no value to a litigant, either in the court below or here. Such is unquestionably the rule. 2 Cyc. 1049. If the legislature had intended to change the method of taking exceptions, as well as the time, it would have been as simple to have provided a new method, as well as a new time. Not having done so, we must assume it was the legislative intent to change the time only, but preserve the former method.

The exceptions here urged, not having been taken in the manner prescribed, are of no value to appellants, and upon objection cannot be considered of any force or effect. We have no alternative other than to grant respondent's motion and affirm the judgment. It is so ordered.

Rudkin, C. J., Gose, Fullerton, and Chadwick, JJ., concur.

[No. 8779. Department Two. June 21, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. MAX THUNA, *Appellant*.[1]

PROSTITUTION—COMMON PROSTITUTE—DEFINITION. To constitute one a common prostitute under Rem. & Bal. Code, § 2440, making it a crime to live with or accept the earnings of a common prostitute, it is not essential that she submit herself to sexual intercourse for gain (RUDKIN, C. J., CHADWICK, GOSE AND MORRIS, JJ., dissenting).

CRIMINAL LAW—EVIDENCE—PROOF OF OTHER CRIMES—ADMISSIBILITY. In a prosecution for living with a common prostitute, letters showing that the accused had been living with the woman and that she was a prostitute for hire, are not inadmissible because they show that the accused had committed other crimes.

PROSTITUTION—LIVING WITH PROSTITUTE—INFORMATION—TIME OF OFFENSE—SUFFICIENCY. An information for living with a common prostitute is not insufficient because it charges the offense to have been committed on a single day instead of charging a continuing offense; since so living for one day with intent to continue the relation constitutes the offense.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 7, 1910, upon a trial and conviction of the crime of living with a common prostitute. Affirmed.[2]

Brightman & Tennant, for appellant.

George F. Vanderveer and *Jerold Landon Finch*, for respondent.

MOUNT, J.—This appeal is prosecuted from a judgment upon conviction of the crime of living with a common prostitute, alleged to have been committed on December 30, 1909. Appellant argues that the court erred in defining a common prostitute as follows:

"A common prostitute is a woman who offers her body to an indiscriminate intercourse with men. Intercourse con-

[1]Reported in 109 Pac. 331; 111 Pac. 768.

[2]NOTE: Withheld from publication pending rehearing.—REP.

fined exclusively to one man does not make a woman a common prostitute. If a woman by words or acts or by any device invites and solicits and submits to indiscriminate intercourse, she is a common prostitute. Whether a woman is a common prostitute is a question of fact which does not depend alone upon the number of persons with whom she has had illicit intercourse, nor does it depend alone upon the question of whether she submits herself for gain. Her avocation may be known or inferred from the manner in which she plies it. The jury are to consider her general conduct and all other circumstances, if any are shown by the evidence in the case, tending to show whether or not she so holds herself out to the public."

It is contended that this instruction is erroneous because it states that the fact that a woman is a common prostitute does not depend alone upon the question whether she submits herself for gain. Several definitions by textwriters and several cases are cited, which say in substance that a common prostitute is a female given to promiscuous sexual intercourse for the sake of gain.

While we are of the opinion that the sake of gain is probably the most usual motive, it is not the only one, and it is not necessarily essential to constitute a common prostitute. A woman who submits herself to indiscriminate sexual intercourse with men, without hire, is certainly as much a common prostitute as one who does so solely for hire. In *State v. Clark*, 78 Iowa 492, 43 N. W. 273, the court said:

"Counsel, if we understand him correctly, thinks that prostitution consists in sexual commerce for gain. It is sometimes so defined, but we think if a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute. Her avocation may be known from the manner in which she plies it, and not from pecuniary charges and compensation gained in any other manner."

See, also, *State v. Rice*, 56 Iowa 431, 9 N. W. 343; *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135. The court therefore did not err in this instruction.

It is also argued that the court erred in receiving in evidence certain letters written by the appellant to a friend, because such letters showed that the appellant was guilty of other crimes beside the one charged, and also because some of these letters did not show that the appellant was living with the woman referred to therein. Certain of the letters did show that the appellant was guilty of other crimes, but they also showed conclusively that the appellant had been for some time living with the woman; that she was a common prostitute for hire, and that appellant knew the facts. The letters were, therefore, clearly admissible as evidence upon this charge. It is true that other crimes may not be shown for the purpose of conviction upon the one charged, but these letters showed guilt of the crime charged and were therefore competent. They were not to be excluded entirely because they at the same time contained admissions of other crimes. Certain of the letters made no further reference to the woman than "Lilly sends regards," but this statement was some evidence of the fact that "Lilly" was present at the time the letters were written, and was occupying the same relation to the appellant that she had theretofore established.

It is next argued that the information is insufficient, because it charged the appellant with living with a common prostitute on one day only, to wit, on December 30, 1909, and that to live with implies that the parties shall dwell together for some considerable period of time, and the information to be sufficient should have charged an offense as having been committed between certain dates. The argument is sound that the offense of living with a prostitute is a continuing offense, and it may be charged as such between certain dates. But it does not follow that it may not be charged upon a particular day. The fact that the parties lived together for one day is sufficient, if it is shown that they were doing so with an intention of remaining together. The proof in this case is clear that the woman was a common prostitute

for hire, and that appellant lived with her on that day and for months prior thereto in violation of decency and law.

There is no error in the record, and the judgment is therefore affirmed.

CROW, PARKER, and DUNBAR, JJ., concur.

RUDKIN, C. J. (dissenting)—The information in this case was filed under section 2440, Rem. & Bal. Code, which provides, among other things, that "every person who shall live with or accept any earnings of a common prostitute," shall be punished by imprisonment in the state penitentiary. The generally accepted definition of a common prostitute is a woman given to promiscuous sexual intercourse for hire or gain. *Commonwealth v. Cook*, 12 Metc. (Mass.) 93; *State v. Gibson*, 111 Mo. 92, 19 S. W. 980; *Davis v. Sladden*, 17 Ore. 259, 21 Pac. 140; *Springer v. State*, 16 Tex. App. 591; *State v. Ruhl*, 8 Iowa 447; *State v. Stoyell*, 54 Me. 24, 89 Am. Dec. 716.

It occurs to me that the legislature had this class of prostitutes in mind when it enacted the above section, else why refer to their earnings. I am therefore of opinion that the instruction complained of was erroneous and calls for a reversal of the judgment. If the woman was not a common prostitute, as thus defined, the appellant is guilty of another and lesser offense, for which he should be prosecuted and punished.

ON REHEARING.

[*En Banc.* November 19, 1910.]

PER CURIAM.—A hearing *en banc* was granted in this cause, but after a reargument a majority of the court are of opinion that the judgment should be affirmed, and it is so ordered. From this conclusion Rudkin, C. J., and Chadwick, Gose, and Morris, JJ., dissent, for the reasons stated in the dissenting opinion heretofore filed by the chief justice.

[No. 8840. Department Two. September 3, 1910.]

E. F. HARSIN, *Appellant*, v. LOUIS L. OMAN *et al.*, *Respondents*.[1]

PLEADING—COMPLAINT—SUPPLEMENTAL PLEADINGS—AMENDMENT AFTER DECISION—DISCRETION. In an action for breach of covenant against incumbrances, it is not an abuse of discretion to deny leave to file a supplemental complaint, after a trial before the court without a jury and after the court had orally announced its decision for nominal damages, in order to show payment and discharge of the incumbrances by the plaintiff after the decision was made.

Appeal by plaintiff from a judgment of the superior court for Spokane county, Webster, J., entered March 19, 1910, upon findings in favor of the plaintiff for nominal damages, in an action for breach of covenant against incumbrances. Affirmed.

John L. Dirks, for appellant.

Starkey & Belknap, for respondents.

PARKER, J.—This is an action to recover damages for breach of covenants of warranty. From a judgment in favor of the plaintiff, awarding him nominal damages only, he has appealed to this court, contending that the trial court erroneously denied his motion for leave to file a supplemental complaint.

In May, 1909, appellant commenced this action, alleging in his complaint, in substance, that, in January, 1909, the respondents conveyed to him for valuable consideration certain lots in Spokane, by deed containing covenants of warranty to the effect that the lots were then free from all incumbrances; that the lots were not then free from incumbrances, but were subject to certain local assessments, and that prior to the commencement of the action he demanded of respondents that they remove the incumbrance, which they have refused to do. The prayer was for damages in a sum equalling

[1]Reported in 110 Pac. 621.

the amount of the assessments. There were no allegations in the complaint showing payment of the assessments by appellant, or of any impairment of his possession or enjoyment of the lots.

After a trial upon the merits, on January 3, 1910, the court orally announced its decision in favor of the appellant, and fixed the amount of his recovery at the sum of one dollar. This was evidently upon the theory that he was entitled to nominal damages only. Thereafter, on January 15, 1910, the appellant's attorney served upon respondents' attorneys a motion for an order granting leave to file in the action a supplemental complaint, a copy of the proposed supplemental complaint being served with the motion. This complaint contained, in substance, the same allegations as the original complaint, and contained additional allegations showing that the appellant had paid the assessments on January 6, 1910. This alleged payment, it will be noticed, was made after the court had orally announced its decision upon the merits.

The only question argued by learned counsel for appellant in his brief is the alleged error of the court in denying their motion for leave to file the supplemental complaint. The principle announced in the recent decision of this court in the case of *International Development Co. v. Clemans*, *ante* p. 398, 109 Pac. 1034, is, we think, decisive of this case. In that case the appellant moved for leave to file a supplemental complaint after the case was submitted to the jury and before verdict was rendered. The making of the motion was there evidently prompted by the charge of the court to the jury, indicating that the plaintiff would be entitled to nominal damages only, as it was here evidently prompted by the court's decision. The original issues in that case were, in substance, the same as here, as were the new facts sought to be brought into the case by the proposed supplemental complaint. Indeed, that case differs from this only in that it was being tried by a jury, and the motion came after the

submission of the cause to the jury and before verdict; while this case was being tried by the court, and the motion came not only after submission of the cause to the court upon the merits, but after the court had actually announced its decision upon the merits. It was held there was no abuse of discretion in the trial court denying the motion in that case, and it necessarily follows that there was no abuse of discretion in this case. That decision not only shows the correctness of the trial court's decision upon the motion for leave to file a supplemental complaint, but also that the decision of the court upon the merits was clearly right.

We are of the opinion that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8615. Department Two. June 13, 1910.]

HERMAN SEEFELDT, *Respondent*, v. LOUISE SEEFELDT, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, William D. Totten, Esq., judge *pro tempore*, entered September 17, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for divorce. Affirmed.

Shorett & Shorett and *Thomas T. Littell*, for appellant.
James E. Bradford, for respondent.

PER CURIAM.—This is a divorce case. The statement of facts is comprised of between three and four hundred pages of testimony of the ultra salacious type, a specific review of which would serve no useful purpose. The case involves only questions of fact. An examination of the testimony convinces us that the decree of the trial court was equitable. The judgment will therefore be affirmed.

[1]Reported in 109 Pac. 1119.

[No. 8764. Department Two. July 2, 1910.]

In re ALLEN.[1]

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered February 11, 1910. Affirmed.

Sharpstein & Sharpstein and *Herbert C. Bryson* (*Hiram F. Garretson*, of counsel), for appellant.

PER CURIAM.—This is an appeal from an order adjudging the appellant insane and unsafe to be at large, and committing him to the Western Washington Hospital for the Insane, at Fort Steilacoom. The charge of insanity was tried before a jury, at the instance of the appellant, and insufficiency of the evidence to justify the verdict and order of commitment is the only error assigned. Four competent physicians testified that the appellant is insane and unsafe to be at large, and their opinion is strongly fortified by facts within their knowledge and by other testimony in the record, both oral and written. Such being the state of the record, a further review of the testimony will serve no useful purpose. The judgment is affirmed.

[No. 8685. Department Two. July 9, 1910.]

STENA AUSTIN, *Respondent*, v. JOHN INGLE, *Appellant*.[2]

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered November 30, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for an assault with intent to commit rape. Affirmed.

Merritt, Oswald & Merritt, for appellant.
Birdseye & Smith and *Martin & Wilson*, for respondent.

PER CURIAM.—This is an action brought by the respondent against the appellant to recover damages in the sum of $10,000, resulting from an alleged assault and attempt to commit the crime of rape. The case was tried to a jury and a verdict rendered in favor of respondent, for which judgment was duly entered. It is not claimed that any error was committed by the court in giving or refusing to give instructions, in the admission or rejection of testimony, or in any other particular. But the contention is, (1) that under the

[1]Reported in 109 Pac. 1119.

[2]Reported in 109 Pac. 794.

evidence the jury should have found in favor of the defendant, and (2) that the verdict is so excessive that it suggests such passion and prejudice on the part of the jury as would prevent the appellant from obtaining a fair trial.

An examination of all the testimony in the case convinces us that there was sufficient legal evidence, if the jury believed it, to find not only the issues generally in favor of the respondent, but also to find the amount of damages expressed in the verdict.

The judgment is affirmed.

[No. 8601. Department Two. July 15, 1910.]

ANCHOR BUGGY COMPANY, *Respondent*, v. J. E. HOUTCHENS *et al.*, *Appellants*.[1]

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 15, 1909, upon findings in favor of the plaintiff, in an action to vacate a deed, after a trial on the merits before the court without a jury. Affirmed.

Rader & Barker, for appellants.

Will H. Fouts, *R. M. Sturdevant*, *M. O. Pickett*, and *T. P. & C. C. Gose*, for respondent.

PER CURIAM.—This is an appeal from a judgment of the superior court of Walla Walla county, declaring a deed, given by J. S. Galloway and S. E. Galloway to appellant James E. Houtchens, purporting to convey title to certain tracts of land in Walla Walla and Columbia counties, state of Washington, to be fraudulent and void, and declaring the judgment of the respondent to be a valid lien upon the real estate described in said deed.

Conceding the correctness of the legal propositions submitted by the appellants, to the effect, that a deed conveying real estate is presumed to have been made without a fraudulent intent; that fraud is never presumed but must be established by the party alleging it; that a debtor even in failing circumstances may in good faith dispose of his entire property for the purpose of paying a portion of his debts, although other debts are left unsatisfied; that the circumstances relied upon must be such as to reasonably consist only with intent to defraud and be inconsistent with an honest intent, and that evidence that merely casts a suspicion on a transaction is not sufficient to vitiate it, we are yet of the opinion that the findings made by the court were fully justified by the testimony, and that the judgment properly followed the facts found by the court.

Affirmed.

[1]Reported in 109 Pac. 1019.

[No. 8273. *En Banc.* August 6, 1910.]

GEORGE MCDONNELL, *Appellant*, v. COEUR D'ALENE LUMBER COMPANY, *Respondent*.[1]

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 23, 1907. Affirmed.

C. P. Lund, *W. T. Stoll*, and *Edwin McBee*, for appellant.
Wakefield & Witherspoon and *E. P. Twohy*, for respondent.

ON REHEARING.

PER CURIAM.—After a rehearing of this case *en banc*, a majority of the court adhere to the rule and conclusion reached upon the first hearing (56 Wash. 495, 106 Pac. 135), and the judgment is therefore affirmed.

[No. 8735. Department Two. September 3, 1910.]

JOSEPH A. AGOSTI, *Respondent*, v. A. BRESSI, *Appellant*.[2]

Appeal from a judgment of the superior court for King county, Main, J., entered November 16, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury. Affirmed.

William C. Keith, for appellant.
Fred H. Peterson and *Philip D. MacBride*, for respondent.

PER CURIAM.—On October 7, 1907, the plaintiff owned an unpaid purchase money mortgage which, as he alleges, was left by him with the defendant for collection. The defendant made no report of interest collected, nor did he surrender the mortgage to plaintiff when demanded. Thereupon plaintiff brought this action in which he alleged, that an assignment of the mortgage had been fraudulently procured and recorded by defendant; that defendant, who was his agent, had collected $90 interest, for which he had failed to account, and that he refused to surrender the mortgage. The defendant pleaded a purchase of the mortgage, which was denied by the reply. Upon trial, judgment was entered in plaintiff's favor for interest collected, for a return of the mortgage, and

[1]Reported in 110 Pac. 13.

[2]Reported in 110 Pac. 1082.

for a cancellation of the recorded assignment. The defendant has appealed.

The only issue is one of fact. The trial court found that the appellant had not purchased the mortgage; that he was attempting to defraud the respondent, to whom the mortgage belonged. We have carefully examined the evidence and conclude that the findings of the trial court must be sustained. The judgment is affirmed.

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27. APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. The granting of a new trial for error in instructions, although no exceptions were taken to the instructions, is so far discretionary with the trial court that it will not be reversed on appeal, if the instructions were erroneous. *Moore v. Marsh*..... 151

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29. APPEAL—REVIEW—VERDICT. A verdict supported by substantial evidence cannot be set aside on appeal because of conflict in the testimony, or because against the weight of the evidence. *Olmstead v. Olympia*..... 147

30. APPEAL—REVIEW—FINDINGS OF REFEREE. The findings of a referee upon conflicting evidence sustained by the trial court will not be disturbed on appeal. *Miller v. Caughren*..... 554

31. APPEAL—REVIEW—FINDINGS. Findings upon flatly conflicting evidence, depending on the credibility of witnesses produced before the trial judge, should be sustained on appeal. *Hackett v. Scott*... 390

32. APPEAL—REVIEW—FINDINGS. Findings upon absolutely conflicting evidence will not be disturbed on appeal. *Kinder v. Poulsen* 289

APPEAL AND ERROR—CONTINUED.

33. APPEAL—REVIEW—FINDINGS. In the absence of the evidence it will be presumed sufficient to support a decree, although the findings were defective and incomplete. *Nelson v. McPhee*..... 103

34. APPEAL—REVIEW—HARMLESS ERROR — COURTS — ORDER OUTSIDE COUNTY. Error, if any, in setting a cause for trial by an order made outside of the county in which the action is pending is harmless where the party had notice and a fair trial. *Portland and Seattle R. Co. v. Skamania Boom Co*..... 191

35. APPEAL—REVIEW—HARMLESS ERROR—STRIKING ANSWER. Error in striking an affirmative defense in an answer is harmless where the court ruled that the defense was fully presented by the denials in the answer and allowed the parties to show the facts. *McLeod v. Russell* 676

36. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. It is harmless error to allow experts to state whether a platform was properly constructed and give opinions as to the cause of its falling, where reasonable minds could not differ and their conclusions were so self-evident that no prejudice could result. *Luper v. Henry*.... 33

37. APPEAL — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE. Error cannot be urged in the admission of statements by an agent that he was employed by the defendants, when it was not objected to at the time and a prima facie case of employment had been made out. *Knust v. Bullock*..... 141

38. SAME—EVIDENCE—SUFFICIENCY. Error cannot be predicated on insufficiency of the evidence to sustain a liability upon one ground where there was no request to withdraw that ground from the consideration of the jury, and there was sufficient to sustain a recovery on another branch of the case. *Knust v. Bullock*.... 141

39. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error cannot be predicated upon the admission of cumulative evidence upon a point proven at length without objection. *Driver v. Galland*..... 201

40. APPEAL—REVIEW—IMPROPER EVIDENCE. The improper admission of letters which were privileged, in an action tried to the court, is not ground for reversal, as they will not be considered on appeal. *Schaad v. Robinson*..... 346

41. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error in the admission or rejection of evidence in a case tried to the court is harmless where it can be disregarded without affecting the result. *Hackett v. Scott*..... 390

42. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence is harmless in an action tried to the court without a jury. *Parks v. Elmore*..... 584

APPEAL AND ERROR—CONTINUED.

43. APPEAL—REVIEW—PLEADING—HARMLESS ERROR. It is not reversible error to overrule a demurrer to an indefinite or uncertain pleading. *Dickerman v. Reeder*..... 405

44. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Where there was no evidence warranting the submission to the jury of the issue of assumption of risks, error in instructions thereon are not prejudicial to the defendant. *LaBee v. Sultan Logging Co*..... 341

45. APPEAL—REVIEW—INSTRUCTIONS—HARMLESS ERROR — MASTER AND SERVANT—ASSUMPTION OF RISK. An instruction to the effect that a servant assumes ordinary risks, "provided the master has used ordinary diligence to eliminate them" is not necessarily prejudicial where it did not stand alone, and in a number of other instructions the law of assumption of risk is clearly set forth so that the jury could not have been misled. *Engelking v. Spokane*..... 446

46. APPEAL—REVIEW—SECOND APPEAL—LAW OF CASE. Upon a second appeal, the supreme court cannot reconsider the questions determined on the former appeal. *Starr v. Long Jim*..... 190

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

47. APPEAL—REMAND—VACATING SUPERSEDEAS ON CERTIORARI—EFFECT —REMITTITUR. Where, upon affirmance of an order adjudging a public use in a condemnation case, the supreme court vacated the supersedeas granted at the time of allowing the writ of review, the lower court may proceed with the trial without waiting for the remittitur from the supreme court. *Portland and Seattle R. Co. v. Skamania Boom Co*..... 191

48. APPEAL—DECISION—REMAND. Where an assessment by a city council is erroneously confirmed on appeal to the superior court, for the reason that no fraud had been shown, without considering the merits, the case will be remanded for a full hearing in the court below. *Real Estate Investment Co. v. Spokane*..... 416

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT.
Lien for appliances used in work of construction, see MECHANICS' LIENS, 1.

APPOINTMENT:

Of guardian for estate of insane nonresident, see INSANE PERSONS.
To fill vacancy in state office and duration of term, see STATES.

APPROPRIATION:

Of water rights in public lands, see WATERS AND WATER COURSES, 1-3.

ARBITRATION:

Performance of option upon failure of arbitrators to agree, see SPECIFIC PERFORMANCE, 3.

ARCHITECT:

Certificate as evidence in action on building contract, see CONTRACTS, 6, 7.

ARTICLES:

Sufficiency to establish partnership relation, see PARTNERSHIP, 1.

ASSAULT:

Excessive bail, see BAIL.

Inadequate or excessive verdict, see DAMAGES, 6.

ASSAULT AND BATTERY:

Ejection of passenger, see CARRIERS, 4-6.

Conviction of assault and battery on indictment for assault with intent to rob, see INDICTMENT AND INFORMATION, 1.

ASSESSMENT:

For public improvement, see CEMETERIES.

Of compensation for property taken for public use, see EMINENT DOMAIN, 7-12.

For public improvements in city, see MUNICIPAL CORPORATIONS, 13 18-23.

Of tax, see TAXATION, 1.

ASSIGNMENT:

Right of assignee of claims to letters of administration, see EXECUTORS AND ADMINISTRATORS, 1.

Of pre-emption or homestead rights in public lands, see PUBLIC LANDS.

ASSUMPTION:

Harmless error in instructions as to assumption of risk, see APPEAL AND ERROR, 44, 45.

Of risk by employee, see MASTER AND SERVANT, 12, 13.

Of facts by court in charge to jury, see TRIAL, 4.

AUTHORITY:

Of broker, see BROKERS.

Estoppel of agent to deny validity of unauthorized mortgage, see ESTOPPEL.

Of partner in joint enterprise to fix freight charges, see JOINT ADVENTURES.

Of agent, see PRINCIPAL AND AGENT.

Veto powers of governor, see STATUTES, 2.

BAIL:

1. BAIL—EXCESSIVE BAIL—CRIMINAL CHARGE—ASSAULT. Bail in the sum of $5,000 on a charge of assault in the second degree is not excessive, where the assault was atrocious and without provocation and the maximum penalty is imprisonment for ten years in the penitentiary or a fine of $1,000, or both. *In re Rainey*..... 529

BAILMENT:

By warehousemen, see WAREHOUSEMEN.

1. BAILMENT—CONTRACTS—SUFFICIENCY—PAROL EVIDENCE—PLEADINGS—ISSUE. A brief written memorandum reciting that defendant rented to plaintiff a certain cold storage room for storing beef at a certain price, to begin at a certain time, does not create a complete contract of bailment, rendering the defendant liable for negligence in maintaining the storage at the proper temperature; and it may be shown by parol that it was contemporaneously agreed that the defendant should not have possession of the meat, but that the plaintiff should have complete control and possession of the room and direction over the temperature. *Patterson v. Wenatchee Canning Co.* 556

BALLOTS:

See ELECTIONS.

BAR:

Of action by former adjudication, see JUDGMENT, 4.
Of action by limitation, see LIMITATION OF ACTIONS, 3.

BENEFITS:

Acceptance of as ground of estoppel, see ESTOPPEL.
Assessment of benefits caused by construction of public improvements, see MUNICIPAL CORPORATIONS, 13, 18-23.

BILLS AND NOTES:

Notes as fraud upon creditors, see FRAUDULENT CONVEYANCES, 1.
Gifts of negotiable instruments, see GIFTS.

1. BILLS AND NOTES—CHECK BY STRANGER—RIGHTS OF PAYEE—DUTY TO ACCOUNT. The payee of a check drawn by a stranger to him is not a purchaser of the check nor a holder in due course, and if he receives it he is bound to account to the drawer upon demand. *Bowles Co. v. Clark*..... 336

2. BILLS AND NOTES—ACTION—BY INDORSEE—DEFENSES—FRAUD—HOLDER IN DUE COURSE—BURDEN OF PROOF. In an action by an indorsee of a note given for the purchase price of fixtures, evidence that the maker procured the note by fraud and removed and refused to deliver the fixtures, and that when the note was presented by a bank for payment after maturity, it did not have any indorse-

BILLS AND NOTES—CONTINUED.

ments thereon, is sufficient to put the plaintiff upon proof that he was a holder in good faith before maturity. *Gottstein v. Simmons* 178

BONA FIDE PURCHASER:

From married man of community property, see HUSBAND AND WIFE, 1, 2.

BONA FIDE SETTLERS:

As appropriators of waters for irrigation, see WATERS AND WATER COURSES, 1, 2.

BONDS:

On appeal, see APPEAL AND ERROR, 14-17.

Of county officers, see COUNTIES.

Limitation of action on official bond, see LIMITATION OF ACTIONS, 1, 2.

BOUNDARIES:

Apportionment of excess along boundary line, see DEDICATION.

1. BOUNDARIES—LOCATION—MONUMENTS—COURSES AND DISTANCES—EVIDENCE—SUFFICIENCY. Where surveyors testified that some years previous by actual surveys they found the initial corner stake of a platted addition and other original stakes at corners of lots on plaintiff's land, showing full sized lots forty feet wide in accordance with the plat, and corresponding with the present street lines, the monuments found govern and control a call in the plat giving courses and distances from a certain government corner as the location of the initial corner of the plat, which would locate the initial corner in the street and add 13.9 feet to plaintiff's lots. *Campbell v. Seattle* 612

BREACH:

Of contract, see CONTRACTS.

Acts of county auditor constituting breach of official bond, see COUNTIES.

Of covenants, see COVENANTS.

Of contracts and damages therefor, see DAMAGES, 1-4.

Of conditions, see DEEDS, 2.

Temporary suspension of sprinkler system as affecting recovery on fire insurance policy, see INSURANCE, 4-7.

Of contract of sale, see SALES, 3, 5, 7.

BRIDGES:

Liability of city for negligence in construction of bridge, see MUNICIPAL CORPORATIONS, 29.

BRIEFS:

On appeal or writ of error, see APPEAL AND ERROR, 22-24.

BROKERS:

Consideration for promise to make resale of property for purchaser, see CONTRACTS, 1.

Estoppel to deny validity of unauthorized mortgage, see ESTOPPEL.

Agreement to resell property as not within statute of frauds, see FRAUDS, STATUTE OF, 1.

1. BROKERS—LIABILITY—RECOVERY OF EARNEST MONEY—FACT OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. In an action to recover earnest money paid on an intended purchase of land, the preponderance of the evidence shows that plaintiff dealt with the defendant as an agent or broker, and not as the principal, and defendant is not liable for the earnest money where it appears that the defendant, a corporation engaged in the real estate business, a day or two after application by the plaintiff for tide lands, submitted a proposition on property belonging to one C., whom two witnesses testified was present at plaintiff's office with defendant's employee, that plaintiff, who was a lawyer, drew his check for $700 payable to the defendant, and insisted upon two receipts, which he drew up, one being from C. to the defendant for $500 earnest money, $200 being the amount of defendant's commissions retained by it, and that four days later, at defendant's office, plaintiff met C., as he claims for the first time, and objected to the contract of sale because C. was a married man and the contract was not signed by C.'s wife, and not because the contract was not signed by the defendant; since the recitation in the receipt that C. had received the $500 from the defendant must be construed in the light of the whole transaction, and the other circumstances bear the scale in favor of the respondent. *Abbott v. Crawford & Conover*..... 402

BUILDINGS:

Building contracts, see CONTRACTS, 6, 7.

Damages for delay in completion of building, see DAMAGES, 3.

Copy of plans and specifications as evidence, see EVIDENCE, 6.

Pleading in action to foreclose lien on building, see MECHANICS' LIENS, 2.

BURDEN OF PROOF:

On indorsee to show holder in due course, see BILLS AND NOTES, 2.

Plaintiff's deed as forgery, see EJECTMENT, 1.

To show notice of wife's equity in community property, see HUSBAND AND WIFE, 2.

To show title or right to possession, see REPLEVIN, 1.

BURIAL GROUNDS:

See CEMETERIES.

CANALS:

Condemnation for irrigation canals, see EMINENT DOMAIN, 2-6.

CANCELLATION OF INSTRUMENTS:

Setting aside fraudulent conveyances, see FRAUDULENT CONVEYANCES.
Rescission of contracts, see SALES, 4.
Rescission of contract of sale of land, see VENDOR AND PURCHASER, 2-4.

CARRIERS:

1. CARRIERS—PASSENGERS—WHO ARE. A person who had purchased a railway ticket and was waiting in the depot for his train is a passenger. *Whitlock v. Northern Pac. R. Co*..... 15

2. CARRIERS—PASSENGERS—NEGLIGENCE—SNOW AND ICE ON STEPS. It is not evidence of negligence that snow and ice accumulated on the steps and at the entrance of a street car between the time a passenger boarded the car in the downtown district and the time he reached his destination. *Caywood v. Seattle Electric Co*..... 566

3. CARRIERS—PASSENGERS—CONTRIBUTORY NEGLIGENCE. Where a passenger on a street car has signaled the conductor to stop and the signal has been answered before he left his seat, he cannot justify his leaving the seat while the car was traveling at a high rate of speed by the fact that it was sometimes necessary for passengers to leave their seats in order to attract the attention of the conductor. *Caywood v. Seattle Electric Co*..... 566

4. CARRIERS—PASSENGERS—EJECTION FROM DEPOT—ASSAULT BY OFFICER—LIABILITY OF CARRIER. A deputy sheriff who was called by a railway station agent to assist in ejecting undesirable trespassers who were occupying seats in the depot, acts as agent of the railway company and within the scope of his authority, when he wrongfully assaults a passenger in attempting to eject persons from the depot, at the agent's request, and the company is liable for the damages inflicted. *Whitlock v. Northern Pac. R. Co*..... 15

5. SAME—NEGLIGENCE OF CARRIER—ASSAULT ON PASSENGER—EVIDENCE—SUFFICIENCY. It is negligence for a railway station agent, who called a deputy sheriff to assist in ejecting undesirable trespassers from the depot, to fail to notify the officer who the passengers were, when this could have been easily done; and in such case proof of an assault upon a passenger by the officer makes out a *prima facie* case for damages against the railway company. *Whitlock v. Northern Pac. R. Co*..... 15

6. SAME—PASSENGERS—EJECTION FROM DEPOT—DEGREE OF CARE—INSTRUCTIONS. In an action by a passenger, waiting in the depot for his train after purchasing a ticket, for an assault by an officer called by the agent to eject trespassers from the depot, it is correct to instruct that the railway company owes the highest degree of

CARRIERS—CONTINUED.

care that an ordinarily prudent man would give for the protection of such passengers as against its own machinery, appliances, operation and conduct of its employees; and the use of the word "machinery" is not prejudicial as interjecting a new element in the case, where the issue was clearly defined, the jury could not have been misled, and were instructed that plaintiff could not recover if the company used reasonable care to prevent the assault. *Whitlock v. Northern Pac. R. Co*..... 15

CEMETERIES:

1. CEMETERIES—EXEMPTION OF LANDS — MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS. A cemetery company organized as a private corporation, which has sold burial lots to be used for that purpose only, is not entitled to the exemption of its unsold property from local improvement assessments, under Rem. & Bal. Code, §§ 3640, 3645, exempting from taxation the lands of cemetery associations incorporated or conducted under the law relating to charitable associations. *In re Sixth Avenue West, Seattle* 41

2. SAME—TAXATION. Rem & Bal. Code, § 9098, exempting from general taxation all lands used exclusively for burying grounds or cemeteries, does not exempt such lands from assessments for local improvements. *In re Sixth Avenue West, Seattle*..... 41

3. SAME—EXEMPTIONS—STATUTES—CONSTRUCTION. Rem & Bal. Code, § 3640, providing that whenever any part of a burying ground, established by individuals associating for that purpose, shall have been designated and appropriated by the proprietor as the burying ground of any particular person or family, it shall not be liable to be taken or disposed of for any tax or debt whatever, is broad enough to exempt from local assessments the burial lots in a cemetery deeded to private owners, to be used exclusively for burial purposes, although the cemetery is owned by a cemetery company organized as a private corporation for profit, and not as a charitable association, as contemplated by Id., § 3639, authorizing the association of individuals for that purpose. *In re Sixth Avenue West, Seattle*. 41

CERTIFICATE:

Of architect as evidence in action on building contract, see CONTRACTS, 6, 7.

CHARACTER:

"Previous chaste character" as defense, see RAPE.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 9, 10.

For delinquency in payment of telephone rentals, see TELEGRAPHS AND TELEPHONES.

To jury in civil actions, see TRIAL, 1-5.

CHARTER:

Of municipal corporations, see MUNICIPAL CORPORATIONS, 1-3.

CHATTEL MORTGAGES:

Priority of mortgage lien over agister's lien, see ANIMALS, 2.
As fraudulent conveyances, see FRAUDULENT CONVEYANCES, 1.

CHECKS:

See BILLS AND NOTES.

CHILD:

Injury to child from dynamite caps, see EXPLOSIVES.
Places attractive to children, see NEGLIGENCE.

CITATION:

See PROCESS.

CITIES:

See MUNICIPAL CORPORATIONS.

CLAIMS:

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1.
Against municipal corporation for injury in streets, notice of, see MUNICIPAL CORPORATIONS, 31.

COLLECTION:

Of taxes, see TAXATION.

COLLISION:

Between street cars or with vehicles, see STREET RAILROADS.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMISSIONERS:

Eminent domain commissioners as city officers, see MUNICIPAL CORPORATIONS, 12.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

In general, see HUSBAND AND WIFE.

COMPENSATION:

Recovery for work done under contracts, see CONTRACTS, 3-7.
Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.
For property taken for public use, see EMINENT DOMAIN, 7-13.
For use of money, see INTEREST.
For services, see MASTER AND SERVANT, 1, 2.
Employment by month and recovery for time lost by sickness, see WORK AND LABOR.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 9-12.

COMPLAINT:

In civil action, see PLEADING.

CONCLUSION:

Of witness, see EVIDENCE, 9-12.

CONCLUSIVENESS:

Of architects' certificate, see CONTRACTS, 7.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONS:

Precedent to right of foreign corporation to sue, see CORPORATIONS, 7.
In deeds, see DEEDS, 2.
In lease, see LANDLORD AND TENANT, 3.
Precedent to action by partnership, see PARTNERSHIP, 3, 4.
Precedent to declare forfeiture of contract for sale of land, see VENDOR AND PURCHASER, 3.

CONFIRMATION:

Of assessment for public improvements, appeal from, see MUNICIPAL CORPORATIONS, 18-23.
Of receiver's sale, see RECEIVERS.

CONSENT:

To sexual intercourse, see RAPE.
Of owner as defense to action for trespass on realty, see TRESPASS.

CONSIDERATION:

Of contract in general, see CONTRACTS, 1.
Necessity for stating consideration in contract for sale of personalty, see FRAUDS, STATUTE OF, 3.
Of fraudulent conveyance, see FRAUDULENT CONVEYANCES, 1.
Lease as consideration for option in favor of lessee, see VENDOR AND PURCHASER, 1.

CONSTITUTIONAL LAW:

Condemnation of property, see EMINENT DOMAIN, 2.
Validity of statute fixing duration of judgment lien, see JUDGMENT, 6.
Prohibiting or regulating hospitals for insane as exercise of police power of city, see MUNICIPAL CORPORATIONS, 24-27.
Delegation, extent and exercise of police power by municipalities, see MUNICIPAL CORPORATIONS, 24-27.
Practice of dentistry, see PHYSICIANS AND SURGEONS.
Amendment of statutes, see STATUTES, 1.

CONSTRUCTION:

Of contracts, see CONTRACTS, 3, 4.
Of contract providing for penalty or forfeiture, see DAMAGES, 4.
Of divorce decree making division of property, see DIVORCE, 4.
Of easement in deed, see EASEMENTS.
Expert opinion as to safe construction of platform, see EVIDENCE, 10.
Of statute granting relatives and next of kin letters of administration, see EXECUTORS AND ADMINISTRATORS, 2.
Of act providing for license for salmon fishing, see FISH.
Of policy of fire insurance, see INSURANCE, 5-7.
Of covenants in lease, see LANDLORD AND TENANT, 3.
Of contract of employment, see MASTER AND SERVANT, 1, 2.
Of statutes regulating practice of medicine, see PHYSICIANS AND SURGEONS.
Of contract of sale, see SALES, 1, 3.

CONTINUANCE:

Grant of on allowance of amendment to pleading, see PLEADING, 5.

1. CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE. A continuance is properly denied to defendant to secure the attendance of a witness in its employ in British Columbia and under its control, where his evidence had been given on a former trial, issues on amended pleadings had been made up for two months, and no excuse was shown for failing to take his deposition, nor due diligence exercised to secure his attendance. *LaBee v. Sultan Logging Co*..... 341

CONTRACTS:

Agistment, see ANIMALS.
Bailment, see BAILMENT.
Subscription to corporate stock, see CORPORATIONS, 1-4.
Covenants in deeds, see COVENANTS.
Liquidated damages or penalties, see DAMAGES, 2, 3.
Damages for breach, see DAMAGES, 1-4.
Admission of parol or extrinsic evidence, see EVIDENCE, 7, 8.
Of decedents, see EXECUTORS AND ADMINISTRATORS, 3.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of husband or wife, see HUSBAND AND WIFE.

CONTRACTS—CONTINUED.

Of insurance in general, see INSURANCE.
Of employment, see MASTER AND SERVANT, 1, 2, 14.
Municipal contracts, see MUNICIPAL CORPORATIONS, 11.
Alternative allegations in action on contract, see PLEADING, 1.
Implied authority of agents to make contracts, see PRINCIPAL AND AGENT, 1-3.
Contracts relating to public lands, see PUBLIC LANDS.
Waiver of contractor's lien, see RAILROADS.
Sales of personalty, see SALES.
Specific performance, see SPECIFIC PERFORMANCE.
Sale of land, see VENDOR AND PURCHASER.
Recovery for lost time through sickness under employment by month, see WORK AND LABOR.

1. CONTRACTS—CONSIDERATION. That a real estate agent was enabled to earn his commissions on a sale of real estate is a sufficient consideration for his promise to the purchaser to make a resale within nine months or refund the purchase price. *Herkenrath v. Ragley* 52

2. CONTRACTS—MUTUALITY. A contract whereby plaintiff agreed to pay a certain price for fish during the season, if he purchased any from the defendant, is not lacking in mutuality because optional on the part of the plaintiff, where it contained other stipulations obligating the plaintiff to limit his catch under certain conditions and to deliver all his surplus fish to the defendant at a certain price. *Parks v. Elmore* 584

3. CONTRACTS — CONSTRUCTION — ESTOPPEL. A subcontractor for railroad construction work is not bound by the engineer's fixing a price for the removal of cement gravel, when it was encountered, the contract not having fixed the same, and is not estopped to recover the reasonable value by continuing work after receiving notice of the engineer's decision, he never having agreed to the same. *Holm v. Chicago, Milwaukee and Puget Sound R. Co.*..... 293

4. CONTRACTS—EXCAVATIONS—CONSTRUCTION — TERMINATION — EXTRA WORK. A clause in a contract for an excavation providing that, if the contractor encounters rock requiring blasting, he agrees to stop excavating and accept proportionate payment, does not render the contract no longer obligatory upon his encountering rock, and authorize him to recover on *quantum meruit* for services thereafter performed, when construed with other provisions of the contract, whereby he first agreed to excavate the lot and remove and clear away all earth and rubbish not requiring blasting, and further agreed to accept proportionate payment for earth removed if rock was encountered, and also agreed to blast and remove rock at $1.25 per cubic yard at the option of the owner; and construing the entire contract together, he was not entitled to extra pay for "preparing and clearing the rock for blasting," since the same was included in the contract. *James v. Beebe*..... 380

CONTRACTS—CONTINUED.

5. CONTRACTS — FOR DIGGING WELL — ABANDONMENT — EXPENSES INCURRED BY OWNER. Under a contract whereby plaintiff was to drill a well for defendant, the defendant to furnish the feed for horses, coal and board while drilling for water, the defendant, on abandonment of the contract by plaintiff, is entitled to recover expenses incurred for feed, coal, and board furnished for six weeks while plaintiff was fishing for tools lost in the well through his negligence. *Kinder v. Poulsen*..... 289

6. CONTRACTS—BUILDING CONTRACTS—ARCHITECT'S CERTIFICATE—ISSUANCE—WAIVER OF OBJECTIONS. In an action on a building contract, an architect's final certificate of the completion of the building is properly admitted in evidence against the contractor, where, after cutting down the contractor's bill for extras, the certificate was issued showing the completion of the building and the amount due, and was delivered by the architect to a third person to be delivered to the contractor when he should accept the allowance for extras, and thereafter the contractor did not seek arbitration as required by the contract in case of any dispute as to the amount allowed for alterations, since he thereby waived any objection to the allowance for extras and accepted the same. *Dickerman v. Reeder*..... 405

7. SAME — CONCLUSIVENESS — ARCHITECT'S CERTIFICATE — WAIVER. Where it is not claimed that an architect acted arbitrarily or fraudulently, it is error to allow in full a contractor's claim for extras, where the final certificate of the architect, made a prerequisite to an action on the building contract, cut down the amount claimed by the contractor, and the contractor waived objection to the allowance by failing to seek arbitration as required by the contract in case of any dispute. *Dickerman v. Reeder*..... 405

CONVERSION:

Of corporate funds by officer, see CORPORATIONS, 4, 5.

1. CONVERSION — COMMUNITY PROPERTY — CONDEMNATION — JUDGMENT FOR DAMAGES. A judgment for damages upon the condemnation of community property is not deemed real property upon the doctrine of equitable conversion, in a controversy between the husband and wife living separate and apart, but is personal property, subject to the control and management of the husband. *Stay v. Stay*..... 651

CONVEYANCES:

In general, see DEEDS.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
By husband or wife, see HUSBAND AND WIFE.
As security for debt, see MORTGAGES.
Of rights in public lands, see PUBLIC LANDS.

CORPORATIONS:

Municipalities, see MUNICIPAL CORPORATIONS.

Uniformity of taxation of individuals and corporations, see TAXATION, 1.

Rates and charges of telephone companies, see TELEGRAPHS AND TELEPHONES.

Infringement of trade-name, see TRADE-MARKS AND TRADE-NAMES.

Corporate books as privileged trade secrets, see WITNESSES, 1.

1. CORPORATIONS—STOCKHOLDERS — PLEDGES — STOCK HELD AS COLLATERAL SECURITY—LIABILITY FOR UNPAID SUBSCRIPTIONS. The pledgee of corporate stock, holding the same as collateral security for a loan made by him to the corporation, the stock being represented to him as issued to another and fully paid for, is not liable upon the statutory liability of stockholders to creditors for unpaid subscriptions, although the stock was re-issued in his name and stands on the books as his absolute property, in view of Rem. & Bal. Code, § 3700, providing that pledgees and persons holding stock as collateral security shall not be liable to creditors as stockholders, but that the pledgor only shall be liable. *Johnstone v. Black*..... 144

2. CORPORATIONS — STOCK — SALE OF SHARES — ESCROW—CONTRACT—TRANSFER OF TITLE. A contract identifying a certificate of 10,000 shares of corporate stock, placed in escrow, to be delivered to one of the parties on expiration of the escrow, and declaring it to be his property, is an acknowledgment, as between the parties, that the title thereto is in such party. *Bell v. Scranton Coal Mines Co.*. 659

3. CORPORATIONS—STOCK—SUBSCRIPTION—FRAUD — EVIDENCE — SUFFICIENCY. The evidence is insufficient to show fraud in securing a subscription to the stock of a corporation to be paid for by the conveyance of land, upon representations that all the stock was subscribed and that a plant for the manufacture of steel castings would be constructed on the land, where it merely appears that the work of constructing the steel plant was suspended on account of a financial depression and not abandoned, and all the stock was subscribed, although part of the subscribers were probably not financially responsible, there being however no such want of ability to pay and knowledge by the corporation as to support a charge of fraud in procuring the subscriptions; especially where the plaintiff consummated the land deal by a deed without conditions after suspension of the work of construction of the plant. *Jones-Thompson Investment Co. v. Cascade Steel Foundry Co*..... 601

4. CORPORATIONS—FRAUD—TREASURY STOCK—MISAPPLICATION OF PROCEEDS—LIABILITY OF STOCKHOLDERS. Where the promoters of a mining corporation conveyed the mines and property to the corporation in consideration of the stock, subscribed for and issued to themselves, application of the proceeds of treasury stock to repay advances for

CORPORATIONS—CONTINUED.

the purchase price of the mines and the cost of securing patents is a fraud upon the corporation and the purchasers of treasury stock, the proceeds of which should have been used for development; and judgment against such promoters is properly entered for the sums so diverted. *Eureka Mining, Smelting & Power Co. v. Lively*... 550

5. CORPORATIONS—STOCK—TRANSFERS — INNOCENT PURCHASER — LIEN OF COMPANY. A wife of a stockholder, taking his stock on a pre-existing debt, with full knowledge of how he acquired it, is not an innocent purchaser, and takes subject to the debt of her husband to the corporation for fraudulent diversion of the proceeds of treasury stock, where the by-laws prohibited transfers until the stockholder's debt to the company was first paid. *Eureka Mining, Smelting & Power Co. v. Lively*..... 550

6. SAME—PRESUMPTION AS TO OWNERSHIP—ESTOPPEL. Where stock was voted upon a by-law prohibiting transfers until indebtedness to the company was first paid, as the stock of one of the original subscribers then indebted to the company, it must be presumed to have been his stock at the time. *Eureka Mining, Smelting & Power Co. v. Lively* 550

7. CORPORATIONS—FOREIGN CORPORATIONS—ACTIONS—DOING BUSINESS IN STATE. A foreign corporation, to which a policy of fire insurance is made payable in case of loss, may maintain an action on the policy without having paid an annual license fee or otherwise complied with the laws relating to the doing of business in this state by foreign corporations. *Port Blakely Mill Co. v. Springfield Fire and Marine Ins. Co*..... 501

CORROBORATION:

Of prosecutrix in prosecution for rape, see RAPE, 3.

COSTS:

1. COSTS—WITNESS FEES. Costs are properly allowed for a witness who attended at the request of the prevailing party without subpoena, although not called to testify because the course of the trial rendered the testimony unimportant. *Dolan v. Cain*..... 259

COUNCIL:

See MUNICIPAL CORPORATIONS, 1-7, 11.

COUNTIES:

1. COUNTIES — OFFICERS — OFFICIAL BONDS — BREACH — VIOLATION OF DUTY. A compensated surety on the official bond of a county auditor cannot make the defense that the auditor's receipt and conversion of license fees properly payable to the treasurer, his issuance of illegal warrants, and his forgeries by the raising of warrants, were merely

COUNTIES—CONTINUED.

private acts and not official acts constituting a breach of his bond, where they were breaches of his official duty as auditor and could not have been successfully perpetrated as a private citizen. *Skagit County v. American Bonding Co*..... 1

2. COUNTIES — OFFICERS — DUTIES — LIQUOR LICENSES — PAYMENT OF FEES. Rem. & Bal. Code, § 6263, requiring liquor licenses to be paid "annually in advance to the county treasurer, who shall pay ten per cent of the amount into the state treasury," does not require the licensee to personally pay the county treasurer before issuance of the license is ordered by the county commissioners; but the same is to be paid to the treasurer by the auditor with whom the fee is deposited upon making application, after the application is granted. *Skagit County v. American Bonding Co*..... 8

3. COUNTIES—OFFICERS — DUTIES—OFFICIAL BONDS. Under Rem. & Bal. Code, § 3917, subd. 9, directing the county auditor, as clerk of the board of county commissioners to "perform all other duties required by law or any rule or order of the board," it is a breach of the auditor's official bond to embezzle liquor license fees deposited with him as clerk of the board, after he had been ordered by the board to issue the licenses and pay the fees over to the county treasurer. *Skagit County v. American Bonding Co*..... 8

4. SAME. The embezzlement by the county auditor of fees for recording marriage licenses, paid to him by reason of his official position, although there was no law authorizing him to receive the same, is a breach of his official bond for which his surety is liable; but the recovery must be limited to the fees received during the term of office covered by the bond. *Skagit County v. American Bonding Co.* 8

COURTS:

Review of decisions, see APPEAL AND ERROR.

Harmless error in setting cause for trial by order made outside county, see APPEAL AND ERROR, 34.

Condemnation proceedings, see EMINENT DOMAIN.

Jurisdiction in injunction proceedings, see INJUNCTION.

Jurisdiction to appoint guardian of estate of nonresident insane person, see INSANE PERSONS.

Conclusiveness of judgments, see JUDGMENT, 4.

Powers of equity to question enactment of ordinances, see MUNICIPAL CORPORATIONS, 8, 10.

Time for holding election as political question, see MUNICIPAL CORPORATIONS, 3.

Jurisdiction in replevin, see REPLEVIN, 2.

COVENANTS:

Construing covenants in lease, see LANDLORD AND TENANT, 3.

COVENANTS—CONTINUED.

1. COVENANTS—WARRANTY—QUALIFICATIONS—ESTATE GRANTED — EXCEPTION OF MORTGAGE. Where a deed of land subject to mortgage recited immediately after the description "clear of all incumbrances except" the mortgage, only the equity of redemption subject to the mortgage was granted; and a general warranty in the habendum clause, covenanting that the property is free of all incumbrances and that the grantor will warrant and defend the same against all lawful claims of all persons whomsoever, is qualified by the prior recital of the lien, and applies only to the estate granted and not to the lien. *Schaad v. Robinson*..... 346

2. COVENANTS—AGAINST INCUMBRANCES—BREACH—DAMAGES. A covenant of warranty against incumbrances is one of indemnity and only nominal damages can be recovered for a breach, where the plaintiff fails to allege either an eviction or a discharge of the incumbrances. *International Development Co. v. Clemans*..... 398

CREDITORS:

See FRAUDULENT CONVEYANCES.

Right of creditor to appointment as administrator of estate of deceased debtor, see EXECUTORS AND ADMINISTRATORS, 1, 2.

CRIMINAL LAW:

See FALSE PRETENSES; HOMICIDE; PROSTITUTION; RAPE.

Bail, see BAIL.

Embezzlement by county auditor and action on bond, see COUNTIES.

Conviction of offense included in that charged, see INDICTMENT AND INFORMATION, 1.

Equity jurisdiction over criminal proceedings, see INJUNCTION, 2.

Practicing medicine without license, see PHYSICIANS AND SURGEONS, 1.

1. CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. The savings clause in the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing in this act shall apply to an offense committed before the day when this act shall take effect and that such offense shall be punished under existing laws as if this act had not been passed, is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect. *State v. Lorenzy*..... 308

2. CRIMINAL LAW—STATUTES—REPEAL—SAVINGS CLAUSE. Under the general savings clause in the act of 1901, which saved all proceedings "pending at the time of its enactment," and under the penal code of 1909 (Rem. & Bal. Code, § 2294), providing that nothing therein contained shall apply to an offense committed before it took effect but that such offense should be punished under the law existing when it was committed, it is not essential to a prosecution for such prior offense that it was pending when the penal code of 1909 took effect. *State v. Lorenzy*..... 308

CRIMINAL LAW—CONTINUED.

3. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—ADMISSIBILITY. Evidence relevant to the issues of a cause is not inadmissible because it tends to show the commission of a crime other than the one charged. *State v. Dana*..... 30

4. CRIMINAL LAW—EVIDENCE—PROOF OF OTHER CRIMES—ADMISSIBILITY. In a prosecution for living with a common prostitute, letters showing that the accused had been living with the woman and that she was a prostitute for hire, are not inadmissible because they show that the accused had committed other crimes. *State v. Thuna* 689

5. CRIMINAL LAW—TRIAL—MISCONDUCT OF COURT. In a prosecution for homicide, it is misconduct on the part of the trial judge, requiring a new trial, to make an imputation against the good faith of counsel in taking objections or exceptions to the ruling of the court upon the admission of evidence. *State v. Phillips*..... 252

6. CRIMINAL LAW—NEW TRIAL—VERDICT—IMPEACHMENT. Under the statute making misconduct of the jury a specific ground for a new trial in a criminal case, the verdict may be impeached by affidavits of jurors where the misconduct does not "inhere" in the verdict, which means where it does not fall within or pertain to the legitimate issues in the case. *State v. Lorenzy*..... 308

7. SAME Where a juror, during deliberation, stated to other jurors, as of his own knowledge, facts material to the case tending to discredit the losing party as a witness, the misconduct does not inhere in the verdict and may be shown by affidavits. *State v. Lorenzy* 308

8. SAME. In a prosecution for conniving at the prostitution of the wife of the accused, where the state was concluded by the testimony of the defendant that a certain house at B. was not a house of prostitution, it is misconduct, requiring a new trial, for a juror who lived at B., to state to other jurors during deliberation that if they would go to B. they would find the place to be "a house of prostitution yet." *State v. Lorenzy*..... 308

9. CRIMINAL LAW—APPEAL—HARMLESS ERROR. Upon a conviction of murder in the second degree, error in instructions in defining deliberation and premeditation are immaterial. *State v. Phillips*. 252

10. CRIMINAL LAW—APPEAL—DECISION—INSTRUCTIONS—HARMLESS ERROR. Under an instruction authorizing a conviction of assault and battery, under an information charging an assault with intent to rob, a verdict of guilty of assault and battery will be sustained as a conviction of assault; since the instruction was not prejudicial except as authorizing a conviction for a battery. *State v. Beatty*.. 235

CROPS:

Lien on crops for rent, see LANDLORD AND TENANT, 4.

CRUELTY:

Ground for divorce, see DIVORCE, 1.

DAMAGES:

Judgment for as personal property upon condemnation of community property, see CONVERSION.

Breach of covenant, see COVENANTS, 2.

Compensation for appropriation under power of eminent domain, see EMINENT DOMAIN, 7-13.

Liability of city for consequential damages in grading street, see MUNICIPAL CORPORATIONS, 14, 15.

Injuries from public improvements, see MUNICIPAL CORPORATIONS, 13-16.

Amendment to show damages occurring after commencement of action, see PLEADING, 6-8.

For breach of contract for sale of goods, see SALES, 5.

In actions for specific performance of contracts, see SPECIFIC PERFORMANCE, 5.

1. DAMAGES—PENALTY—NOMINAL DAMAGES. In a controversy over the title to corporate stock claimed to be forfeited on violation of a penalty, only nominal damages will be inferred in the absence of proof of actual damages. *Bell v. Scranton Coal Mines Co*..... 659

2. DAMAGES—LIQUIDATED DAMAGES—BREACH OF PARTNERSHIP AGREEMENT. Liquidated damages may be awarded for the breach of articles of copartnership for conducting a tailoring business for the period of five years, where the articles provided that any member withdrawing therefrom without the consent of his copartners shall pay the sum of $1,000 as liquidated damages, no fraud or illegality appearing; since the ascertainment of damages would be difficult and uncertain. *Yatsuyanagi v. Shimamura*..... 24

3. DAMAGES—STIPULATED DAMAGES—DELAY. A contract for stipulated damages of five dollars per day for delay in the completion of a building is enforcible. *Dickerman v. Reeder*..... 405

4. DAMAGES—PENALTY—FORFEITURE—CONTRACTS — CONSTRUCTION. A contract for the sale of 20,000 shares of corporate stock provides for a penalty of forfeiture, which will not be enforced in equity, where it provides that 50,000 shares of stock deposited in escrow by the vendors shall be received by the vendees in case the vendors do not pay certain debts of the corporation assumed by them, whether the vendees complete the purchase or not, that it was optional with the vendees to pay said indebtedness and receive the 50,000 shares, and that if they elected not to pay the debts and decided not to purchase the 20,000 shares they were to have returned to them the purchase money paid and also receive the 50,000 shares of the vendor's stock deposited in escrow; since the shares deposited in escrow to secure payment of the debts assumed by the vendors are to be forfeited by

DAMAGES—CONTINUED.

the defaulting party at all events regardless of the different degrees of importance of the several acts, thus making the stipulated securities in some instances too large. *Bell v. Scranton Coal Mines Co.* 659

5. DAMAGES—INJURY TO PROPERTY—EXCESSIVE VERDICT. A verdict for $1,500 damages from the sluicing and removal of earth from a lot cannot be said to be excessive, where there was evidence that the lot was worth $4,000 or $5,000 before the injury, and was now of no value to live on, the nature of the wrongs was fully described to the jury, two juries awarded the same damages, and two trial judges had permitted the verdicts to stand. *Buyken v. Lewis Construction Co.* 220

6. DAMAGES—PERSONAL INJURIES—ASSAULT—EXCESSIVE VERDICT. A verdict for $1,000 for an assault upon a passenger in ejecting him from a depot is excessive and should be reduced to $500, where he suffered for only about thirty-six hours from a blow on the neck, and no further attempt was made to eject him upon the agent's calling attention to the mistake of the officer in attempting to do so. *Whitlock v. Northern Pac. R. Co.* 15

7. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,800 for injuries sustained by a common laborer 26 years of age is not excessive, where his spine was injured, probably permanently, and he had been unable to perform manual labor for nine months at the time of the trial. *Luper v. Henry* 33

8. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $8,000 is not excessive where the injury to a pedestrian through a fall into a ditch in a street resulted in the fracture of a knee cap, rupture of the knee capsule and other injuries, crippling plaintiff for life, and bringing on traumatic neurasthenia. *Pierce v. Spokane* 615

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT.

DEATH:

Admissibility of declarations of persons since deceased, see EVIDENCE, 5.

Alleging death in information, see HOMICIDE, 1.

1. DEATH—EVIDENCE—SUFFICIENCY. The death of a person is sufficiently established by evidence that it was publicly announced in the daily papers of the city, and an undertaker testified that he had embalmed and shipped a body coming into his custody as that of the deceased. *Washington Safe Deposit and Trust Co. v. Lietzow* 281

DECEDENTS:

See EXECUTORS AND ADMINISTRATORS.

DECISION:

On appeal, see APPEAL AND ERROR, 46-48.
Inconsistency of rulings of trial judge, see NEW TRIAL, 2.

DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 1-5.

DEDICATION:

1. DEDICATION—PLATS—BOUNDARIES—EXCESS. Where fifty-foot lots and the streets as marked on the plat occupy the entire space between the north and south boundaries of the tract, any excess would be apportioned among the lots; and an excess or strip of four and one-half feet along a boundary line could not be claimed by the plattors or those claiming under them. *Booth v. Clark*.. 229

DEEDS:

Validity, construction and effect of covenants in deeds, see COVENANTS.
Reservation of easement, see EASEMENTS.
Absolute deed as mortgage, see MORTGAGES, 1.
Tax deeds, see TAXATION, 3-6.

1. DEEDS—DATE OF EXECUTION—PRESUMPTION. A deed is presumptively executed and delivered on the date of its execution and acknowledgment. *State v. Dana*..... 30

2. DEEDS—FORFEITURE—BREACH OF CONDITIONS—MERGER OF PRELIMINARY MATTERS. There can be no forfeiture of land conveyed by absolute deed without conditions, pursuant to a contract to erect thereon a manufacturing plant, where the only condition precedent to the making of the conveyance was the expenditure of $5,000 in preparing the ground, which was fulfilled, and the contract fixed no time for the completion of the plant, the construction of which had simply been suspended and not abandoned; since the preliminary matters were merged in the deed, which could not be set aside for breach of condition not expressed in it. *Jones-Thompson Investment Co. v. Cascade Steel Foundry Co*..... 601

DEFAULT:

Validity of oral promise to bind third person, see FRAUDS, STATUTE OF, 4.
Judgment by, see JUDGMENT, 1.
By vendee as forfeiture of contract for sale of land, see VENDOR AND PURCHASER, 2.

DELAY:

In completion of building, see DAMAGES, 3.
Waiver of delay in filing information, see INDICTMENT AND INFORMATION, 2.

DELEGATION:

Of power to condemn property for public use, see EMINENT DOMAIN, 2.

DELINQUENCY:

Charges for delinquency in paying telephone rental, see TELEGRAPHS AND TELEPHONES.

DELIVERY:

Of deed, see DEEDS, 1.
Sufficiency to constitute gift *causa mortis*, see GIFTS.
Of goods sold, see SALES, 3.

DEMAND:

For payment of money due as fixing time when interest begins to run, see INTEREST.
For trial by jury, see LOGS AND LOGGING, 2.
Of delivery of goods purchased, see SALES, 3.

DENIALS:

In pleading, see PLEADING, 3.

DENTISTS:

See PHYSICIANS AND SURGEONS.

DEPOSITIONS:

1. DEPOSITIONS—ATTENDANCE OF WITNESS—PRODUCTION OF BOOKS—STATUTES. An officer authorized to take depositions may compel a witness to produce books and documents, under Rem. & Bal. Code, § 1216, providing that a witness may be compelled by a court to appear and bring with him books and documents, and § 1235, providing that an officer authorized to take depositions may subpoena a witness "in like manner as he may be subpoenaed and compelled to attend as a witness in any court"; and §§ 1236, 1237, providing the manner in which such a witness may be compelled to attend, without any mention of books or documents, were intended to make the other provisions effective, and not to restrict the power of the officer. *In re Bolster*..... 655

DILIGENCE:

Affecting right to continuance, see CONTINUANCE.
Of party asking relief, see SPECIFIC PERFORMANCE, 1, 2.

DISCHARGE:

From liability as insurer, see INSURANCE, 6.
From employment, see MASTER AND SERVANT, 1, 2.

DISCOVERY:

Accrual of action upon discovery of fraud, see LIMITATION OF ACTIONS, 2, 3.

DISCRETION:

Of council to call election, see MUNICIPAL CORPORATIONS, 1, 2.

DISCRETION OF COURT:

Grant or refusal of new trial, see APPEAL AND ERROR, 27, 28.
Admission of declarations as part of *res gestae*, see EVIDENCE, 4.
Findings as to benefits on confirmation of assessment for local improvement, see MUNICIPAL CORPORATIONS, 19.
New trial, see NEW TRIAL, 1.
To allow amendment of pleadings, see PLEADING, 2, 5, 7.
Impeaching own witness, see WITNESSES, 3.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see APPEAL AND ERROR, 14-16, 22-24.
Dismissal on merits as bar to adjudication of community rights or right of separate maintenance, see DIVORCE, 5.
Dismissal of action without prejudice upon denying performance of contract, see SPECIFIC PERFORMANCE, 6.

DIVERSION:

Of proceeds of corporate stock, see CORPORATIONS, 4, 5.
Of water course, see WATERS AND WATER COURSES, 4.

DIVORCE:

1. DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. A decree of divorce sought on the ground of cruelty and personal indignities is warranted where it appears that the defendant manifested a violent temper against the plaintiff, frequently using profane language, that he stated to her and to neighbors that she was not wanted, and that he neglected her while she was sick in bed. *Taylor v. Taylor*... 306

2. DIVORCE—ALIMONY—LIEN—JUDGMENT. A money judgment in lieu of alimony and costs upon granting a divorce does not have the effect of a general judgment and is not a lien upon real estate awarded to the husband as his separate property free and clear of all claims of the wife; since there is no lien for alimony in the absence of statute or express provision in the judgment therefor. *Seattle Brewing & Malting Co. v. Talley*..... 168

DIVORCE—CONTINUED.

3. DIVORCE—ALIMONY—SUIT MONEY. Five hundred dollars alimony and $385 suit money is not an excessive allowance where the husband had several thousand dollars worth of property, and the trial occupied several days' time. *Taylor v. Taylor*..... 306

4. DIVORCE—DECREE—CONSTRUCTION — DIVISION OF PROPERTY. Where the pleadings in a divorce action submitted specified community property to the jurisdiction of the court, praying that an equitable share be apportioned to the wife, a decree, based on findings in favor of the wife, awarding her more than one-half in value of all the property, was intended to set apart such equitable share, and left the balance standing in the husband's name as his share, although not mentioned in the decree, free from any claim of the wife; and the fact that she joined in a mortgage thereof pending appeal is not evidence that she retained an interest therein. *Nelson v. McPhee* 103

5. DIVORCE—DISMISSAL ON MERITS—RES JUDICATA. Where a wife was living separate and apart from her husband, after her action for a divorce had been denied on the merits, and their community property was condemned, she cannot, in the condemnation suit, seek the adjudication of her community rights or her right to separate maintenance, as she is bound by the former adjudication that she is not justifiably living separate and apart from her husband. *Stay v. Stay* 651

DOCTORS:

See PHYSICIANS AND SURGEONS.

DOCUMENTS:

Compelling witness to produce books and documents, see DEPOSITIONS.

DURATION:

Of judgment lien, see JUDGMENT, 5, 6.

DYNAMITE:

See EXPLOSIVES.

EASEMENTS:

1. EASEMENTS—DEEDS—FORFEITURES—CONSTRUCTION. The grant of a "right of way" fourteen feet wide, on condition that it shall be forfeited if the grantee erect any structure of any kind or fence or place any material or obstruction on said right of way other than the construction and repair of walks, is not limited to a walk for footmen; and the same would not be forfeited by the placing thereon of forty or fifty loads of earth for making the same more accessible and convenient for a driveway and which was not an obstruction; since forfeitures are to be strictly construed, and the violation of a condition must be wilful and substantial and not merely technical. *Central Christian Church v. Lennon*..... 425

EJECTION:

Of passengers, see CARRIERS, 4-6.

EJECTMENT:

Recovery of leased premises, see LANDLORD AND TENANT, 9, 10.

1. EJECTMENT—EVIDENCE—FORGERY—BURDEN OF PROOF. Upon an issue as to the forgery of a deed in plaintiff's chain of title, it is presumably in his possession, and the opposite party need not produce it or account for its loss in order to admit the evidence of experts who had compared it with proven signatures. *O'Brien v. McKelvey* 115

2. EJECTMENT—TITLE—PLEADING—ISSUES AND PROOF. In ejectment it is a good defense to plead title in another with right to possession as his agent and that plaintiff's deed is a forgery, under Rem. & Bal. Code, §§ 793, 794, providing that the defendant in ejectment may set up a legal or equitable defense, that the superior title shall prevail, and that he cannot give in evidence any estate in himself or another or license or right to possession unless pleaded. *O'Brien v. McKelvey* 115

3. EJECTMENT—PARTIES—SUBSTITUTION—PROOF OF TITLE. In ejectment a plaintiff suing the owner's agent in possession cannot complain because the agent did not have his rights protected by substituting the owner as party defendant, since plaintiff, under Rem. & Bal. Code, § 792, had the right to make the owner a party defendant. *O'Brien v. McKelvey*..... 115

ELECTION OF REMEDIES:

Motion to vacate as bar to subsequent action, see JUDGMENT, 4.

ELECTIONS:

Selection of freeholders to prepare new charter, see MUNICIPAL CORPORATIONS, 1-3.

Submission of question upon sufficiency of signature to referendum petition, see MUNICIPAL CORPORATIONS, 6.

Between express or implied nature of contract, see PLEADING, 1.

1. ELECTIONS—TIME FOR HOLDING—VACANCY. Elections do not follow by reason of a vacancy, as there can be no election except under express statutory authority. *State ex rel. Fish v. Howell*..... 492

2. ELECTIONS — PRIMARY ELECTIONS—BALLOTS—"CONGRESSIONAL" OFFICE—FIRST AND SECOND CHOICE—STATUTES. The primary election law requiring first and second choice voting for candidates for a "congressional office," where there are four or more candidates, does not extend to or include United States senators, in view of Rem. & Bal. Code, § 4805, where the word "congressional" is qualified by the word "elective" which is not applicable to United States senators within the meaning of state election laws; and in view of the form of the pledge to be signed by state senators and representatives; and

ELECTIONS—CONTINUED.

Id. § 4813 prescribing different positions in the election ballot in which shall be placed the names of candidates for "congressional office" and for "preference for United States senators," above the former being the warning "vote for both first and second choice," and above the latter being the warning "vote for one choice only," the sample ballot containing the names of four senatorial candidates. *State ex rel. Duryee v. Howell*..... 634

EMBEZZLEMENT:

By county auditor, see COUNTIES.

EMINENT DOMAIN:

Judgment for damages in condemnation of community property as personalty, see CONVERSION.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 13-18.

Damages for change of grade of street, see MUNICIPAL CORPORATIONS, 14-18.

1. EMINENT DOMAIN—PROPERTY DEVOTED TO PUBLIC USE—APPEAL—REVIEW. One railroad company may condemn a portion of the right of way of another where there is a necessity therefor and the same can be taken without material detriment or injury to the other company; and if a public necessity exists and each road will have a right of way sufficient for all necessary public use, findings on conflicting evidence in favor of the condemnation will not be disturbed on appeal. *State ex rel. Everett & Cherry Valley Traction Co. v. Superior Court* 598

2. EMINENT DOMAIN—IRRIGATION—PRIVATE OR PUBLIC USE.—CONSTITUTIONAL LAW. Const., art. 1, § 16, prohibiting the taking of private property for private use, except for drains, flumes, or ditches for agricultural etc., purposes, and art. 21, § 1, providing that irrigation etc. purposes shall be deemed a public use, confer legislative authority for Rem. & Bal. Code, §§ 6326 *et seq.*, authorizing the condemnation of land for irrigation ditches by a private owner of agricultural lands. *State ex rel. Galbraith v. Superior Court*..... 621

3. EMINENT DOMAIN—PUBLIC USE—DETERMINATION. The declaration in const., art. 1, § 16, that the question of public use shall be a judicial question to be determined irrespective of legislative assertion, does not mean that it is to be determined without reference to constitutional assertions upon the subject. *State ex rel. Galbraith v. Superior Court.* 621

4. EMINENT DOMAIN — IRRIGATION—ARID LANDS—NECESSITY—BENEFITS. The right to condemn rights of way for irrigation is not limited to the owners of arid land; and sufficient benefit will result to warrant condemnation for irrigation where it appears that the land is semi-arid, raising only a light crop of wheat or wheat hay or

EMINENT DOMAIN—CONTINUED.

crops maturing early in July, while with irrigation it will produce abundantly almost any crop and will be increased $125 to $150 per acre in value. *State ex rel. Galbraith v. Superior Court.* 621

5. EMINENT DOMAIN—IRRIGATION—NECESSITY. The right to condemn rights of way for irrigation contemplates irrigation by gravity, and cannot be defeated by the fact that the land could be irrigated by pumping. *State ex rel. Galbraith v. Superior Court*..... 621

6. EMINENT DOMAIN—IRRIGATION—USE OF LAND. Condemnation for an irrigation canal by a water company owning the lands which it seeks to irrigate cannot be defeated by the fact that the company intends to sell the irrigated lands and that its purpose is speculative. *State ex rel Galbraith v. Superior Court*..... 621

7. EMINENT DOMAIN—DAMAGES—MEASURE—IMPROVEMENTS—REMOVAL TO CONTIGUOUS LOTS. In proceedings to condemn a specified lot on which there was located a building, under Rem. & Bal. Code, § 7777, providing that if a building is damaged so that it cannot be readjusted to the premises, the measure of damages for its condemnation shall be its fair market value, damages are not authorized for readjustment of the building to another contiguous lot which was a separate unit, put to a distinct use, and which was not taken or damaged. *Seattle v. Atwood*..... 112

8. SAME—DAMAGES—TO CONTIGUOUS PROPERTY. Rem. &. Bal. Code, § 7775, does not authorize an owner in condemnation proceedings to claim damages to a lot contiguous to the lot taken, where the lots were separate and appropriated to distinct uses. *Seattle v. Atwood* 112

9. EMINENT DOMAIN — DAMAGES TO REMAINDER — EVIDENCE—SUFFICIENCY. In condemnation proceedings the verdict of the jury finding no damages to land not taken is supported by the evidence, and will not be disturbed on appeal, where one of the witnesses for the city testified that the northerly tract would not be damaged and that there might be about ten per cent damages to the southerly tract, and another witness testified that the southerly portion would be just as valuable now as it was before; especially where the jury viewed the premises and the trial judge sustained the verdict. *Tacoma v. Hansen* 594

10. EMINENT DOMAIN—PROCEEDING—ASSESSMENT OF DAMAGES. Where the full title to land had been condemned for a railroad right of way, the owner is not entitled, in proceedings to assess damages, to have the company produce the plans for the construction of the roadbed. *Portland and Seattle R. Co. v. Skamania Boom Co.* ... 191

11. EMINENT DOMAIN — DAMAGES— EXPERT WITNESSES— COMPETENCY. Where there was an issue as to whether land condemned was more valuable for farming purposes or for booming purposes, it is proper to overrule an objection to the competency of two witnesses who

EMINENT DOMAIN—CONTINUED.

were farmers and competent to testify as to its value for agricultural purposes. *Portland and Seattle R. Co. v. Skamania Boom Co.* 191

12. SAME—EVIDENCE—MATERIALITY. Upon an issue as to the value of land condemned for a railroad right of way, the company should not be required to produce the plans for a bridge which was not on the land in controversy. *Portland and Seattle R. Co. v. Skamania Boom Co.* 191

13. SAME—APPEAL—REVIEW—VERDICT. The award of a jury in a condemnation proceeding well within the extremes of conflicting evidence, after a view of the premises, is conclusive on appeal. *Portland and Seattle R. Co. v. Skamania Boom Co.* 191

EMPLOYEES:

See MASTER AND SERVANT.

ENACTMENT:

Of city ordinances, see MUNICIPAL CORPORATIONS, 8, 10.
Of statutes, see STATUTES, 1.

ENTRY:

By third person as eviction of tenant avoiding payment of rent, see LANDLORD AND TENANT, 7.

EQUITABLE CONVERSION:

See CONVERSION.

EQUITY:

See FRAUDULENT CONVEYANCES; INJUNCTION; SPECIFIC PERFORMANCE.
Equitable conversion, see CONVERSION.
Relief against judgment, see JUDGMENT, 2, 4, 5.
Restraining abandonment of local improvement, see MUNICIPAL CORPORATIONS, 11.
Right to interfere with enactment of ordinances, see MUNICIPAL CORPORATIONS, 8, 10.

ESCROWS:

Sale of corporate stock, see CORPORATIONS, 2.

ESTABLISHMENT:

Of boundaries, see BOUNDARIES.

ESTATES:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

Continuing work after engineer's decision as estoppel to recover reasonable value of work, see CONTRACTS, 3.

To deny ownership of corporate stock, see CORPORATIONS, 6.

Of wife to deny bona fides upon sale of community property, see HUSBAND AND WIFE, 2.

By judgment, see JUDGMENT, 4.

1. ESTOPPEL—PRINCIPAL AND AGENT—POWERS. Where an attorney in fact, with power only to sell, mortgaged the property to borrow money for the purchase price, and then conveyed the land to his wife, he and those claiming under him are estopped to assert that the mortgage was invalid because not authorized by the power of attorney. *Dimmick v. Sprinkel* 329

EVICTION:

Of tenant, see LANDLORD AND TENANT, 7.

EVIDENCE:

To show acknowledgment, see ACKNOWLEDGMENTS, 2.

Review of rulings as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 9, 11, 12.

Review of ruling as dependent on prejudicial nature of error, see APPEAL AND ERROR, 36-42.

To establish boundaries, see BOUNDARIES.

Employment of broker, see BROKERS.

For injuries to passenger, see CARRIERS, 5.

Fraud in securing subscription to corporate stock, see CORPORATIONS, 3.

Proof of other crimes, see CRIMINAL LAW, 3, 4.

Of death, see DEATH.

As to requisites and validity of deeds, see DEEDS, 1.

Production of books and documents, see DEPOSITIONS.

In divorce proceedings, see DIVORCE, 1.

Of experts to show forgery of deed, see EJECTMENT, 1.

Condemnation proceedings, see EMINENT DOMAIN, 9-12.

In action for injuries from explosives, see EXPLOSIVES.

In prosecution for obtaining money by false pretenses, see FALSE PRETENSES.

In actions relating to community property, see HUSBAND AND WIFE, 2.

To show insolvency of insurance company, see INSOLVENCY.

On insurance policies, see INSURANCE, 3.

For injuries to servant in general, see MASTER AND SERVANT, 3-5, 8, 10, 13, 14.

Character of deed as mortgage, see MORTGAGES, 1.

In action for injury to building from fill, see MUNICIPAL CORPORATIONS, 16, 17.

Verdict or findings contrary to evidence, see NEW TRIAL.

Existence of partnership, see PARTNERSHIP, 1, 2.

EVIDENCE—CONTINUED.

Authority of agent, see PRINCIPAL AND AGENT, 1.
Knowledge of defendant's residence, see PROCESS.
In prosecution for rape, see RAPE.
In replevin, see REPLEVIN, 1.
In suit for specific performance, see SPECIFIC PERFORMANCE, 2, 4.
In trespass, see TRESPASS.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE—RES GESTAE—DECLARATION OF PARTY. Where, after a fall from a street car, a boy remained unconscious for eight days, his statement, made at once upon becoming conscious, that the conductor of the car kicked him off the steps, is admissible as part of the *res gestae*. *Britton v. Washington Water Power Co.* 440

2. SAME. In such a case the fact that another witness stated that the boy was semi-conscious on the fifth or sixth day after the accident does not render the evidence inadmissible, but only affects its weight. *Britton v. Washington Water Power Co.* 440

3. SAME—DECLARATIONS OF THIRD PERSONS. In an action for injuries to a boy alleged to have been kicked off the steps of a street car by the conductor after opening the door, the exclamation of a bystander "the boy is off," made as the conductor started to open the door, is admissible as part of the *res gestae*. *Britton v. Washington Water Power Co.* 440

4. SAME—DISCRETION OF COURT. While a large discretion rests in the trial court as to the admission of declarations as part of the *res gestae*, it is prejudicial error where contradictory declarations forming part of the occurrence are admitted as to one litigant and denied as to another. *Britton v. Washington Water Power Co.* 440

5. EVIDENCE—DECLARATIONS BY DECEDENT—ADMISSIONS—SELF-SERVING DECLARATIONS. In an action against executors for services rendered the deceased, evidence of a conversation had with deceased against interest is admissible, but a statement made by him in his favor is inadmissible as a self-serving declaration. *Corbett v. Weaver*. 248

6. EVIDENCE—CONTRACTS—SPECIFICATIONS REFERRED TO—ADMISSIBILITY. In an action upon a building contract which expressly made the plans and specifications a part thereof, although not attached, a copy identified as one of the original plans and specifications is properly admitted in evidence. *Dickerman v. Reeder*.... 405

7. EVIDENCE—PAROL EVIDENCE—CONTRACTS. In an action for services performed, oral testimony as to negotiations prior to a written contract for services is proper, where part of the services were performed before the written contract was made. *Driver v. Galland*. 201

8. EVIDENCE—CONTRACTS—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN. In an action upon a contract for the sale by a fish dealer of "my entire catch" of dog salmon, parol evidence is admissible to show that

EVIDENCE—CONTINUED.

the words "my entire catch" referred to dog salmon which the dealer was compelled to purchase of fishermen in buying silverside salmon and that he did not personally engage in fishing, both parties being familiar with the facts and having operated under a similar contract the year before; since "catch" has not such a definite and fixed meaning as not to admit of explanation under any circumstances. *Parks v. Elmore* 584

9. EVIDENCE—COMPARISON WITH LOST SIGNATURE. The fact that a disputed signature is lost does not exclude the testimony of an expert who had compared it with an admitted signature, especially where the opposite party was presumably in possession of the lost writing and did not account for its loss. *O'Brien v. McKelvey*.. 115

10. EVIDENCE—OPINIONS—SAFE CONSTRUCTION. Upon an issue as to negligence in the construction of a platform, experts may be permitted to answer a hypothetical question as to whether it was properly constructed. *Luper v. Henry*. 33

11. EVIDENCE—HANDWRITING—OPINIONS—COMPARISONS—ADMISSIBILITY. Upon an issue as to whether a deed was a forgery, it was error, warranting the grant of a new trial, to exclude evidence of a witness who was familiar with the grantor's handwriting and had examined the disputed signature and believed that it was not genuine, and to exclude a proven signature for comparison by experts who had seen the forgery. *O'Brien v. McKelvey* 115

12. EVIDENCE—OPINIONS—NONEXPERTS—SPEED OF CAR. Nonexpert witnesses, who have an opportunity for observation in the case at hand, may give their opinions as to the rate of speed at which a street car approached a street crossing and collided with a team. *Tecklenburg v. Everett R. Light and Water Co.* 384

EXAMINATION:

Of witnesses in general, see WITNESSES.

EXCAVATIONS:

Construction of contract relating to, see CONTRACTS, 4.
Injuries from fall of rock, see MASTER AND SERVANT, 10.
Liability of city for injuries by excavations in streets, see MUNICIPAL CORPORATIONS, 30.

EXCEPTIONS:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 7-10.

EXCESS:

Apportionment of excess along boundary line, see DEDICATION.

EXECUTION:

Of deed, see DEEDS, 1.

Of contract for sale of community property by husband alone, see HUSBAND AND WIFE, 3.

1. EXECUTION—SALE PENDING CONTEST—MORTGAGES — FORECLOSURE—RELIEF. Where judgment creditors of a mortgagor were made parties to the foreclosure of a mortgage before they had issued execution on their judgments, which appeared of record as secondary liens, and pending the foreclosure they issued execution and bid in the property at execution sale while the question of the priority of their liens was being vigorously contested in the foreclosure suit, so that the property could not sell for its fair value, they acquire no title by virtue of the execution sale and sheriff's deeds, although the equities entitle them to priority in the proceeds of the property; since their equities can be protected in the foreclosure suit. *Schaad v. Robinson*... 346

EXECUTORS AND ADMINISTRATORS:

Right to appeal from order revoking letters, see APPEAL AND ERROR, 4.

1. EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS — CREDITORS. Assignments of claims after the death of the decedent, do not entitle the assignee to letters of administration as a "creditor" of the decedent. *In re Hoss' Estate*..... 360

2. EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS—RELATIVES—STATUTES — CONSTRUCTION — PROVISOS. Under Rem. & Bal. Code, § 1389, specifying the next of kin entitled to letters of administration upon the estate of a deceased person and fixing the order of their right, followed by "principal creditors," with the proviso that if the persons entitled fail to apply within forty days, or if there be no relatives or next of kin, or creditors, the court may appoint any suitable person, the general words in the proviso, "no relatives or next of kin," must be construed to mean no relatives or next of kin specified in the enacting clause as entitled to letters, and other relatives have no prior right and cannot object to the appointment of any suitable person. *In re Hoss' Estate*..... 360

3. EXECUTORS AND ADMINISTRATORS—CONTRACTS OF DECEDENT — SPECIFIC PERFORMANCE. An option to purchase land contained in a lease, the lessee being the owner of premises thereon, may be specifically enforced in probate, after death of the lessor, under Rem. & Bal. Code, § 1610, providing for the specific performance of contracts by decedents. *Richardson v. Harkness*..... 474

EXEMPTIONS:

Of burial lots from local improvement assessments, see CEMETERIES.

EXPERTS:

As to value of land taken, see EMINENT DOMAIN, 11.

EXPLOSIVES:

1. EXPLOSIVES — NEGLIGENCE — CARE AS TO CHILDREN — EVIDENCE — QUESTIONS FOR JURY. It is for the jury to determine whether a well digger had exercised the highest degree of care in the use of dynamite in a locality where children congregated, where it appears that his operations were carried on within ten feet of the usual route of school children who were accustomed to go from the school house to the post office during the noon recess, that on one such occasion school boys found four dynamite caps on the ground about twenty-five feet from the drill, that the defendant kept the caps in a tool box, only taking out such number as he desired to use, that they were often used by his workmen in his absence, and he had never cautioned or instructed them in regard to the care of the explosives; the inference being that the caps were left there as a result of the work and through the agency of the workmen. *Crabb v. Wilkins* 302

FALSE PRETENSES:

1. FALSE PRETENSES—EVIDENCE—ADMISSIBILITY. In a prosecution for obtaining money by false pretenses, in that the defendants D. and H. represented that they owned a lot of the value of $250, and pointed out another more valuable lot as the lot in question, and procured the money upon H.'s deed of the lot to the prosecuting witness, it is admissible for the state to introduce in evidence a deed of the same lot from H. to D. antedating H.'s deed to the prosecuting witness, for the purpose of showing intent to defraud and that H. had no title at the time of the conveyance to the prosecuting witness. *State v. Dana* 30

FELLOW SERVANTS:

See MASTER AND SERVANT, 9, 11.

FILING:

Statement of facts in lower court, see APPEAL AND ERROR, 20, 21.
Criminal information or complaint, see INDICTMENT AND INFORMATION, 2.

FINDINGS:

Review on appeal or writ of error, see APPEAL AND ERROR, 30-33.
Special findings by jury, see TRIAL, 6.

FIRE INSURANCE:

See INSURANCE, 3-7.

FISH:

1. FISH—LICENSES—LOCATIONS—ABANDONMENT — FISHING SEASON — STATUTES—CONSTRUCTION. Under the general act, applying to all the waters of the state, providing that a salmon fishing license for one year from April 1 shall be deemed abandoned if, during the "fishing

FISH—CONTINUED.

season" covered by the license, the locator fails to construct his appliances, the term "fishing season" applies only to waters where there is a regular fishing season, as on the Columbia river, and locations in Puget Sound are not abandoned upon failure to construct appliances during the summer and fall runs, since salmon abound in Puget Sound at all times of the year, and there is no distinct fishing season within the meaning of the act; and an involuntary abandonment could not be worked during the life of the license. *Gorman & Co. v. Andrews*..... 394

FORECLOSURE:

Effect of execution sale pending foreclosure of mortgage, see EXECUTION.
Of logger's lien, see LOGS AND LOGGING, 2.
Of mechanics' lien, see MECHANICS' LIENS.
Of tax lien, see TAXATION, 2-6.

FOREIGN CORPORATIONS:

See CORPORATIONS, 7.

FORFEITURES:

Under contract for corporate stock and allowance of damages, see DAMAGES, 1, 4.
For breach of condition in deed, see DEEDS, 2.
Of easement, see EASEMENTS.
Of insurance, see INSURANCE, 6.
By vendee by default in payments, see VENDOR AND PURCHASER, 2, 3.

FORGERY:

Of plaintiff's deed as defense, see EJECTMENT, 1, 2.

FRAUD:

See FALSE PRETENSES.
As defense in action on note, see BILLS AND NOTES, 2.
Subscription to corporate stock, see CORPORATIONS, 3-5.
Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.
Accrual of action, see LIMITATION OF ACTIONS.
Infringement of trade-name, see TRADE-MARKS AND TRADE-NAMES.
Of vendor avoiding contract of sale of land, see VENDOR AND PURCHASER, 4.

FRAUDS, STATUTE OF:

Specific performance of contracts partly performed, see SPECIFIC PERFORMANCE, 2.

1. FRAUDS, STATUTE OF—AGREEMENTS AFFECTING REAL ESTATE. An oral agreement by a real estate agent having land for sale that if the plaintiff would purchase the land from the owner he would resell

FRAUDS, STATUTE OF—CONTINUED.

it within nine months, or if failing to so do, would refund the purchase price, is not an agreement for an interest in real estate within the statute of frauds. *Herkenrath v. Ragley*..... 52

2. FRAUDS, STATUTE OF—PART PERFORMANCE—UNACKNOWLEDGED LEASE —VALIDITY. An unacknowledged lease for more than one year becomes binding upon the lessee so as to entitle the lessor to recover damages as upon a valid lease, where the lessor, in consideration of the agreement to pay rent for the full five-year term, made improvements not beneficial to the estate, for the sole use and benefit of the lessee, who took possession and performed the lease for two years, during which time the lessor made further expenditures for the same purposes. *Forrester v. Reliable Transfer Co*..... 86

3. FRAUDS, STATUTE OF—SALES—PERSONAL PROPERTY—STATEMENT OF CONSIDERATION. Under the statute of frauds of the state of Oregon, requiring a contract for the sale of personal property of the value of over $50 to express the consideration, it is sufficient if the contract, without stating the consideration in express terms, shows mutual promises and it is evident that the promise on one part was the consideration for the promise on the part of the other. *Parks v. Elmore* 584

4. FRAUDS, STATUTE OF—DEFAULT OF ANOTHER. An insurance agent is not bound by oral statements of his employee, made after a policy was issued and not known to him, to the effect that an insurance company was solvent and that they would stand back of the policy if the company was not good. *Beckman v. Edwards*..... 411

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—CHATTEL MORTGAGES—CONSIDERATION— VOIDABLE LAND CONTRACT. Notes and a chattel mortgage given in part payment of a voidable land contract not executed by the vendor's wife cannot be set aside as a fraud upon creditors on the theory that they were given without consideration. *Koth v. Kessler* 641

2. FRAUDULENT CONVEYANCES—ACTIONS—JUDGMENTS — LIEN. An action by judgment creditors to set aside a fraudulent conveyance cannot be maintained after the judgment has become dormant and the lien has expired. *Seattle Brewing & Malting Co. v. Donofrio*... 98

GIFTS:

1. GIFTS—CAUSA MORTIS—DELIVERY—WILLS—TESTAMENTARY DISPOSITION—TRUSTS. Where one in feeble health delivered a written assignment of a note and mortgage to the assignee, or a third person, in trust for a son and stepson, and never thereafter had any dominion or control over the same, there was a sufficient delivery to consummate a gift *causa mortis*, and the same is not void as an irregular testamentary disposition of the property. *Hamlin v. Hamlin* 182

GOOD FAITH:

Of party asking equitable relief, see SPECIFIC PERFORMANCE, 1.

GUARANTY:

In contract of sale, see SALES, 6, 7.

GUARDIAN AND WARD:

Guardianship of insane persons, see INSANE PERSONS.

HANDWRITING:

Opinion evidence, see EVIDENCE, 11.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 34-45.
In criminal prosecutions, see CRIMINAL LAW, 9, 10.

HEALTH:

Exercise of police power in interest of public health and safety, see MUNICIPAL CORPORATIONS, 24-27.

HIGHWAYS:

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 28, 30.

HOMESTEAD:

Rights in public lands under homestead laws, see PUBLIC LANDS.

HOMICIDE:

1. HOMICIDE—INFORMATION—ALLEGING DEATH. An information charging that the defendant killed the deceased on a certain day, sufficiently alleges that the deceased died on that day. *State v. Phillips* 252
2. HOMICIDE—INSTRUCTIONS — SELF-DEFENSE. Instructions upon the subject of self-defense to the effect that the defendant had the right to act upon appearances and that the necessity must be real or apparent, are not objectionable because closed with the statement that "the jury and not defendant must be judges of these matters." *State v. Phillips*..... 252
3. HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT. The duty to retreat before taking life in self-defense has no application to one against whom a felonious assault is made with a deadly weapon. *State v. Phillips* 252
4. SAME—INSTRUCTIONS. In a prosecution for murder where the deceased had threatened the defendant and each had armed himself with a rifle and they met and both instantly fired almost simultane-

HOMICIDE—CONTINUED.

ously, it is prejudicial error to give an instruction upon the common law rule relating to the duty to retreat or warn an adversary, if he had time to do so, as it had no application to the facts of the case. *State v. Phillips* 252

HOSPITALS:

Prohibiting maintenance of hospital, see MUNICIPAL CORPORATIONS, 24-27.

HUSBAND AND WIFE:

Judgment for damages as personal property upon condemnation of community property, see CONVERSION.

Divorce and judicial separation, see DIVORCE.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND—VENDOR AND PURCHASER—NOTICE. *Bona fide* purchasers from a married man describing himself in the deed as single and unmarried, are not charged with notice that it was community property, although some of his associates knew that he was married and diligent inquiry might have disclosed the fact, where for several years the grantor had lived in this state separate and apart from his family in a distant state, the community had never occupied the land or made conveyances, and there was no fact or circumstance which would raise a duty in the grantee to inquire. *Daly v. Rizzutto*.. 62

2. SAME—ESTOPPEL OF WIFE—BONA FIDES—BURDEN OF PROOF. Where community property is acquired and sold in this state in defiance of the community rights of the wife in a distant state, proof that the grantee was a purchaser for value and that the title was clear makes out a *prima facie* case of *bona fides* and puts the burden upon the wife to prove notice of her equity. *Daly v. Rizzutto*.... 62

3. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONTRACT BY HUSBAND. A contract for the sale of community land not executed by the wife of the vendor is not void, but only voidable. *Koth v. Kessler* 641

IMPEACHMENT:

Of verdict, see CRIMINAL LAW, 6-8.

Of witness, see WITNESSES, 2, 3.

IMPROVEMENTS:

Possession and improvements as part performance to satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.

Public improvements, see MUNICIPAL CORPORATIONS, 11-20.

INCENDIARISM:

Evidence of in action on fire insurance policy, see INSURANCE, 3.

INCREASE:

Authority of court to increase assessment, see MUNICIPAL CORPORATIONS, 18.

INDIANS:

Appropriation of waters on Indian reservation, see WATERS AND WATER COURSES, 1-3.

INDICTMENT AND INFORMATION:

See HOMICIDE, 1; PROSTITUTION.

1. INDICTMENT AND INFORMATION—LESSER OFFENSES—ROBBERY — ASSAULT AND BATTERY. Under an information charging an assault with intent to rob, the defendant may not be found guilty of an assault and battery; no battery being charged and the same not being necessarily included in the offense of robbery; since Rem. & Bal. Code, § 2167, only authorizes a conviction for a lesser degree of an offense charged, and § 2168 only authorizes a conviction of a lesser offense necessarily included within the offense charged. *State v. Beatty* 235

2. INDICTMENT AND INFORMATION—TIME FOR FILING—DELAY—WAIVER. After the information is filed, it is too late to move for the dismissal of a charge on the ground that no indictment or information was filed against the accused within thirty days after his incarceration, as required by Rem. & Bal. Code, § 2119, where accused passed the delay without complaint. *State v. Lorenzy* 308

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INFRINGEMENT:

Of trade-mark, see TRADE-MARKS AND TRADE-NAMES.

INJUNCTION:

Infringement of trade-mark, see TRADE-MARKS AND TRADE-NAMES.
Interference with water rights, see WATERS AND WATER COURSES, 4.

1. INJUNCTION—TO RESTRAIN TRESPASS—REMEDY AT LAW. An action for an injunction to restrain trespass upon land is properly dismissed where it appears that the issue to be tried is the right to possession under an unacknowledged lease and whether notice was duly given to terminate the tenancy; since plaintiff had adequate remedies at law. *Reeves v. Flath* 299

2. INJUNCTION—EQUITY—ENFORCEMENT OF CRIMINAL LAW. Equity has no jurisdiction to review the judgment of a criminal court or to restrain execution of a criminal sentence, where no property rights will be affected by the enforcement of a void statute. *Brown v. State* 195

INSANE PERSONS:

Prohibiting maintenance of hospital for insane, see MUNICIPAL CORPORATIONS, 24-27.

1. INSANE PERSONS—GUARDIANS—APPOINTMENT. A guardian may be appointed of the estate of one who, following an accident, suffered a nervous shock and ill health, seemed to have forgotten his own identity, and displayed marked symptoms of mental alienation and suddenly disappeared, since which nothing had been heard of him after diligent search for over a year. *In re Sall* 539

2. SAME—JURISDICTION TO APPOINT GUARDIAN—STATUTES—CONSTRUCTION—COURTS—INHERENT POWERS. Construing as a whole the act of 1909 (Rem. & Bal. Code, § 1622 *et seq.*), providing in the first section that the superior court may appoint a guardian of the local estate of an insane person resident in the county, and in section 4, that if the insane person resides out of the state of Washington, service may be had by publication, the court is given jurisdiction to appoint a guardian of the local estate of a nonresident insane person; especially in view of the inherent chancery powers of the court to protect the estates of nonresident incompetent persons, the statute being merely cumulative and concurrent. *In re Sall*..... 539

3. SAME. Const., art. 4, § 6, conferring universal original jurisdiction upon the superior court in all special cases and proceedings not otherwise provided for, is sufficiently broad to embrace general chancery jurisdiction to appoint guardians of the local estate of nonresident insane persons. *In re Sall*..... 539

4. SAME—JURISDICTION TO APPOINT GUARDIAN—DOMICILE. The jurisdiction of the superior court to appoint a guardian of the local estate of an insane person does not depend upon his domicile, but the appointment may be made when his whereabouts is unknown. *In re Sall* 539

5. SAME—APPOINTMENT OF NONRESIDENT. Under Rem. & Bal. Code, § 1622, providing no residential qualifications, the superior court may appoint a nonresident guardian of the local estate of a nonresident insane person. *In re Sall*..... 539

6. INSANE PERSONS—GUARDIANS—JURISDICTION OF PROPERTY. Jurisdiction to appoint a guardian for the estate of a nonresident insane person is limited to property within this state. *In re Sall*..... 539

INSOLVENCY:

Of insurance company, see INSURANCE, 1.

1. INSOLVENCY — EVIDENCE — SUFFICIENCY. That an insurance company became insolvent nine months after a policy was issued, and in insurance reports its condition was rated as very weak, does not show that it was insolvent when the policy was issued. *Beckman v. Edwards* 411

INSTRUCTIONS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 10.
Review as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 10.
As part of record on appeal, see APPEAL AND ERROR, 19.
Harmless error in giving instructions, see APPEAL AND ERROR, 44, 45.
In criminal prosecutions, see CRIMINAL LAW, 9, 10; HOMICIDE.
In civil actions, see TRIAL, 1-5.

INSURANCE:

Validity of oral promise of agent to bind principal, see FRAUDS, STATUTE OF, 4.
Evidence of insolvency of insurance company, see INSOLVENCY, 1.

1. INSURANCE—INSOLVENCY OF COMPANY—LIABILITY OF AGENT. An insurance agent is not liable to the insured by reason of placing and carrying insurance in an insolvent company, where the company was authorized to do business in this state and was solvent at the time the policy was issued, and remained so until after the agent no longer represented the company. *Beckman v. Edwards*..... 411

2. INSURANCE—ACCIDENT INSURANCE—POLICY—MORE HAZARDOUS OCCUPATIONS—LIABILITY. Where a policy of accident insurance provides that, upon change by the insured to a more hazardous occupation, the company's liability shall be only for such proportion of the indemnity as the premium paid would have purchased at the rate fixed by the company for the more perilous hazard, the policy automatically adjusts itself to the occupation of the insured; and where the agent, upon correct answers by the insured stating his occupation as that of a logger, incorrectly stated his occupation in the policy to be that of a logging contractor, recovery can only be had at the rate fixed for the actual and more hazardous occupation. *Bothell v. National Casualty Co*..... 209

3. INSURANCE—LOSS BY FIRE—DEFENSES—INCENDIARISM—EVIDENCE—SUFFICIENCY. In a civil action to recover insurance money the defense of incendiarism only requires a fair preponderance of the evidence, and there is sufficient evidence to require the submission of the same to the jury, where it appears that the plaintiff had the building and contents insured in his own interest, that he was alone at the house early in the evening and left, spending the night with a friend, that a "flash" fire occurred about 4: 00 a. m. and the firemen found the house intact, securely closed up, with coal oil distributed about the house in vessels, on the furniture and clothes, and the plaintiff claimed to have recently purchased and lost in the fire an unusual amount of valuable clothing and was unable to give the names of the merchants from whom it was purchased. *Bruff v. Northwestern Mutual Fire Association*..... 125

INSURANCE—CONTINUED.

4. INSURANCE—FIRE INSURANCE—POLICY — WARRANTIES — SPRINKLER SYSTEM—TEMPORARY SUSPENSION. The temporary violation of a "sprinkler" clause in a fire insurance policy, whereby it was "warranted" that due diligence be used that the automatic sprinkler system shall at all times be in good working order, does not prevent a recovery on the policy, where such temporary suspension of the working order of the system was not in existence at the time of the fire and the damages were not the result of the breach. *Port Blakely Mill Co. v. Springfield Fire and Marine Ins. Co*..... 501

5. SAME — POLICY—CONSTRUCTION—"WARRANTY"—USE OF WORD. A policy of insurance is to be construed in the light of the intent of the parties, and the use of the word "warranted" adds nothing to the force of a stipulation that does not necessarily constitute a warranty; especially in view of the rule that the courts should, in case of any doubt, lean against any construction that imposes upon the assured the obligation of a warranty or where it would work a forfeiture, unless it plainly appears that such was the intention. *Port Blakely Mill Co. v. Springfield Fire and Marine Ins. Co*..... 501

6. SAME—POLICY—CONSTRUCTION—SPRINKLER CLAUSE. A "sprinkler" clause in a fire insurance policy whereby the assured "warranted" that due diligence be used that the automatic sprinker system shall at all times be in good working order, will not be construed to be a warranty, working a forfeiture of the policy for its temporary violation at a time other than when the loss occurred, where the policy expressly provided that for the violation of several other stipulations on the part of the assured the policy should be void and immediately cease, and made no such provision in connection with the sprinker clause; this, on the principle of *expressio unius est exclusio alterius*. *Port Blakely Mill Co. v. Springfield Fire and Marine Ins. Co*..... 501

7. SAME—BREACH OF SPRINKLER CLAUSE. A policy warranting that diligence shall be used that an automatic sprinkler system shall at all times be in good working order, does not warrant that the system shall be in good working order at all times; and the defense of breach of warranty, because of a temporary suspension of the system while repairs were being made, is not available where the court finds and all the evidence shows that due diligence was at all times used and that the system was in good working order at the time of the fire. *Port Blakely Mill Co. v. Springfield Fire and Marine Ins. Co.* 501

INTEREST:

1. INTEREST—UNLIQUIDATED DEMAND. Interest will be allowed upon an unliquidated demand that can be ascertained by mere computation, from the time the demand accrues; and a demand for fish sold at a certain price per fish is such a demand. *Parks v. Elmore*.. 584

INTOXICATING LIQUORS:

Receipt by auditor of license fees and duty to pay over to treasurer, see COUNTIES, 2.

IRRIGATION:

Condemnation for irrigation canal, see EMINENT DOMAIN, 2-6.
Appropriation of waters for, see WATERS AND WATER COURSES, 1-3.

JOINT ADVENTURES:

1. JOINT ADVENTURES—PARTNERSHIP — AUTHORITY OF PARTNER. The officer of the freight department of a copartnership engaged in a joint steamboat venture has authority to agree with the manager of the boat as to freight charges not covered in the agreement between the joint owners of the boat. *Miller v. Caughren*..... 554

JUDGES:

Conduct of judge in criminal trial, see CRIMINAL LAW, 5.

JUDGMENT:

Review in general, see APPEAL AND ERROR.
Appealability, see APPEAL AND ERROR, 1-3.
In condemnation of community property as personal property under control of husband, see CONVERSION.
Dismissal of former action as bar, see DIVORCE, 5.
Divorce proceedings, see DIVORCE.
Expiration of lien as defeating action to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.
Accrual of action to vacate foreclosure judgment, see LIMITATION OF ACTIONS, 3.
Entry of personal judgment in action to foreclose logger's lien, see LOGS AND LOGGING, 2.
Service by publication, see PROCESS.
In replevin, see REPLEVIN, 2.
In specific performance, see SPECIFIC PERFORMANCE, 6.
Sale of land for nonpayment of tax, see TAXATION, 2-6.

1. JUDGMENTS—DEFAULTS. A default cannot be taken against nonappearing defendants for a sum greater than that demanded in the complaint. *In re Sixth Avenue West, Seattle* 41

2. JUDGMENTS—VACATION—GROUNDS—MISTAKE. Rem. & Bal. Code, § 464, subd. 3, authorizing the vacation of judgments or orders for "mistakes, neglect, or omission of the clerk, or irregularity" etc., is not restricted to mistakes of the clerk, but refers to any mistake; and under this section and § 303, Id., authorizing the court in the furtherance of justice to correct a mistake in any pleading or proceeding, it is the duty of the court to correct a mistake made by counsel in entering an order confirming a receiver's sale, so that the same will conform to the order and notice of sale. *National Bank of Commerce v. Kilsheimer & Co*..... 460

JUDGMENT—CONTINUED.

3. JUDGMENTS — VACATION— LIMITATIONS — NOTICE— PURCHASERS AT SALE. Under Rem. & Bal. Code, § 303, authorizing a court to grant relief from a judgment within a reasonable time, and § 466, fixing the extreme limit beyond which judgments cannot be vacated at one year, purchasers at an execution sale under a judgment fair on its face are not represented by the judgment creditor or his attorney after the expiration of one year; and the vacation of a judgment thereafter on notice only to such attorney is void as to purchasers not made parties, regardless of whether the judgment was void. *Keith v. Rose* 197

4. JUDGMENT—BAR—MOTION TO VACATE—RES JUDICATA—ELECTION OF REMEDIES. The denial of a motion to vacate a tax judgment and sale because of invalidity of the proceedings, is *res judicata* and a bar to a subsequent action to quiet title and set aside the judgment and tax title on the same grounds; the motion being an election of remedies. *Newell v. Young* 286

5. JUDGMENT—LIEN—DURATION—STATUTES—IMPLIED REPEAL. Section 1 of the act of 1893, Rem. & Bal. Code, § 445, providing that the lien of a judgment shall continue for five years from the date of rendition, and Rem. & Bal. Code, § 458, providing that in case of appeal to the supreme court the date of the final judgment in the supreme court shall be the time from which said five years shall commence to run, are impliedly repealed by the act of 1897, Rem. & Bal. Code, §§ 459-461, providing that after the expiration of six years from the rendition of any judgment, it shall cease to be a lien and shall not be extended or continued in force for a period longer than six years from the date of the entry of the "original" judgment; the original judgment being that of the trial court in case of an appeal to the supreme court. *Seattle Brewing & Malting Co. v. Donofrio* 98

6. JUDGMENT—LIEN—DURATION—STATUTES — VALIDITY. The act of 1897, Rem. & Bal. Code, §§ 459, 460, 461, limiting the lien of the judgment to six years from its date, and providing that no action can be had upon a judgment after the judgment lien has expired, is constitutional as to limiting the time for the commencement and duration of the lien of judgments upon contracts subsequently arising. *Seattle Brewing & Malting Co. v. Donofrio* 98

JUDICIAL POWER:

Enactment of city ordinances, see MUNICIPAL CORPORATIONS, 10.

JUDICIAL SALES:

On execution, see EXECUTION.
Of property in hands of receivers, see RECEIVERS.
Of land for nonpayment of taxes, see TAXATION, 8, 9, 15, 16, 18-21.

JURISDICTION:

Appellate jurisdiction, see APPEAL AND ERROR.
Equity jurisdiction in criminal proceedings, see INJUNCTION, 2.
Appointment of guardian for estate of nonresident incompetent, see INSANE PERSONS.
Of courts to interfere with enactment of ordinances, see MUNICIPAL CORPORATIONS, 8, 10.
Of court in replevin, see REPLEVIN, 2.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 9, 10.
Disqualification or misconduct ground for new trial, see CRIMINAL LAW, 6-8.
Verdict in condemnation proceedings, see EMINENT DOMAIN, 13.
Instructions in civil actions, see TRIAL, 1-5.

JUSTIFICATION:

Of homicide, see HOMICIDE, 2-4.

KNOWLEDGE:

Effect of ignorance of cause of action on limitation, see LIMITATION OF ACTIONS, 2, 3.
Of natural laws as element of assumption of risk, see MASTER AND SERVANT, 13.
Of residence of defendant as defeating decree based on substituted service, see PROCESS.

LACHES:

As affecting limitation of action, see LIMITATION OF ACTIONS, 3.
In suit to enforce specific performance, see SPECIFIC PERFORMANCE, 1, 2.

LANDLORD AND TENANT:

Reformation of lease to show acknowledgment, see ACKNOWLEDGMENT, 2.
Requirements of statute of frauds as to lease, see FRAUDS, STATUTE OF, 2.
Consideration for option to purchase in favor of lessee, see VENDOR AND PURCHASER, 1.

1. LANDLORD AND TENANT—LEASE—VALIDITY—ACKNOWLEDGMENT. Under Rem. & Bal. Code, § 8802, requiring leases for more than one year to be acknowledged, the acknowledgment which is essential to the validity of a lease is that of the lessor, although the statute does not so provide in terms; and a lease acknowledged only by the lessee is void. *Forrester v. Reliable Transfer Co.* 86

LANDLORD AND TENANT—CONTINUED.

2. LANDLORD AND TENANT—LEASES—ACKNOWLEDGMENT. Rem. & Bal. Code, § 8802, providing that a lease of real estate for more than one year without acknowledgment is not valid, goes to the validity of the lease, and not to the prerequisites for recording it. *Forrester v. Reliable Transfer Co.* 86

3. LANDLORD AND TENANT—LEASE—COVENANTS—CONSTRUCTION. Where the lessor of two blocks subleased the undivided one-half interest in one block and the easterly half of the other block, and the sublease covenanted that the sublessee could conduct certain specified amusements on the east half of the block leased and that the lessor therein should not conduct any amusement on "said premises," the sublease does not operate to restrain the lessor from conducting amusements on the west half of the block not included in the sublease. *Looff v. Seattle Park Co.*..... 217

4. LANDLORD AND TENANT—LIEN ON CROPS—STATUTES—REAL AND PERSONAL PROPERTY. Under Rem. & Bal. Code, § 1188, providing that a landlord shall have a lien on the crops grown upon the demised land for the rents accrued and accruing and "for the faithful performance of the lease," a landlord's lien for rent may be enforced upon crops under a lease renting both real and personal property, where the personal property was a span of horses and work harness leased to be used on the premises in carrying on and conducting the place during the term. *McLeod v. Russell* 676

5. SAME—RENT—ACTION—DEFENSES. The entire rent is not forfeited by failure of the lessor to deliver all of the leased property at the time agreed upon, as it could only defeat a recovery of the rent *pro tanto*. *McLeod v. Russell*..... 676

6. SAME—LIEN ON CROPS—TIME FOR FILING LIEN—STATUTES. Under Rem. & Bal. Code, § 1190, providing that a landlord's lien on crops for rent shall be filed within forty days after the expiration of each year of the lease, a lien may be filed after the rent has accrued not later than the time fixed, and is not void as premature because filed before the expiration of the year. *McLeod v. Russell*..... 676

7. SAME—RENT—DEFENSES—EVICTION. An entry made by a third person with the consent of the lessee does not amount to an eviction, avoiding the payment of rents, merely because the landlord also consented to the entry. *McLeod v. Russell* 676

8. LANDLORD AND TENANT—NEGLIGENCE—INJURY FROM ICE ON STEPS—DUTY OF LANDLORD. The owner of an office building, who had leased the basement to different tenants, approached by a flight of outside steps which were in reasonably safe condition, is not under obligation to protect them from the elements, and is not liable to a customer of one of the tenants who was injured by a fall caused by a thin coat of ice on the steps; since the landlord is liable in such

LANDLORD AND TENANT—CONTINUED.

case only for general repairs and not for temporary obstructions arising from natural causes such as the accumulation of ice and snow. *Oerter v. Ziegler* 421

9. LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—PARTNERSHIP. The notice to pay rent or quit in unlawful detainer of leased premises is sufficient if signed in the firm name of the landlords, where they were doing business as partners under their own surnames. *Bowman v. Harrison* 56

10. LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT. Rem. & Bal. Code, § 812, subd. 2, providing that a tenancy for an indefinite term may be terminated on twenty days' notice, has no application to the alternative notice to pay rent or quit where possession is continued after default, on three days' notice, as provided in Id., subd. 3. *Bowman v. Harrison* 56

LANDS:

See PUBLIC LANDS.

LAW OF CASE:

See APPEAL AND ERROR, 46.

LEASES:

See LANDLORD AND TENANT.

Oral leases as within statute of frauds, see FRAUDS, STATUTE OF, 2.

LETTERS:

Of administration, see EXECUTORS AND ADMINISTRATORS, 1, 2.

LEWDNESS:

Sexual intercourse for gain, see PROSTITUTION.

LICENSES:

Payment of fee as condition precedent to bringing action, see CORPORATIONS, 7.

Receipt by auditor and payment to treasurer of liquor license fee, see COUNTIES, 2.

For fishing, see FISH.

Physicians and surgeons, see PHYSICIANS AND SURGEONS.

LIENS:

Agister's lien, see ANIMALS.

Corporations lien on stock, see CORPORATIONS, 5.

For alimony, see DIVORCE, 2.

Expiration of judgment lien and effect on creditor's right to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, 2.

LIENS—CONTINUED.

Repeal of statutes relating to duration of judgment lien, see JUDGMENT, 5.
Landlord's lien for rent, see LANDLORD AND TENANT, 4-7.
On logs, see LOGS AND LOGGING, 2.
Liens of mechanics and materialmen, see MECHANICS' LIENS.
Mortgage liens, see MORTGAGES, 2.
For labor and supplies for railroads, see RAILROADS.
Tax lien, see TAXATION.

LIMITATION OF ACTIONS:

Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 13.
Action by judgment creditors to set aside conveyance in fraud of creditors, see FRAUDULENT CONVEYANCES, 2.
Vacation of judgment, see JUDGMENT, 3.

1. LIMITATION OF ACTIONS—OFFICIAL BONDS—ACCRUAL OF ACTIONS. The statute of limitations applicable to an action on the official bond of a county officer, for various defalcations and misappropriations of funds which were not known to the county during his term of office, does not begin to run as against the county until the expiration of the term of office for which the bond was given. *Skagit County v. American Bonding Co.* 1

2. SAME—ACTION FOR FRAUD—DISCOVERY. Subdivision 4 of Rem. & Bal. Code, § 159, providing that a cause of action for fraud does not accrue until the fraud is discovered, applies to actions on the official bond of a county officer for embezzlement of funds, under a strict construction of said section. *Skagit County v. American Bonding Co.* 1

3. LIMITATION OF ACTIONS—ACCRUAL—DISCOVERY OF FRAUD—LACHES. An action to set aside a fraudulent judgment of foreclosure is not deemed to have accrued until the discovery of the facts constituting the fraud; and the mortgagor, although extremely dilatory and in default for years, is not barred where he commenced an action to vacate the decree within a few months after discovery of the judgment. *Johnstone v. Peyton* 436

4. SAME—IMPUTED NOTICE—MORTGAGES—JUDGMENT. Notice of entry of a fraudulent judgment is not imputed to a mortgagor who was in default for several years, especially where he met the mortgagee after the foreclosure, which was not disclosed, although the mortgage indebtedness was the subject of conversation between them. *Johnstone v. Peyton.* 436

LIQUIDATED DAMAGES:

See DAMAGES, 2, 3.

LOCATION:

Abandonment of fishing location, see FISH.

LOGS AND LOGGING:

1. LOGS AND LOGGING—SALE OF STANDING TIMBER—REMOVAL. Under a deed of standing timber "to be cut and removed within two years from the date hereof" the grantee has no right to remove the timber after the expiration of the time fixed. *Belcher v. Kleeb*... 166

2. LOGS AND LOGGING—LIEN—PERSONAL JUDGMENT—JURY TRIAL—WAIVER. In an action to foreclose a lien upon logs, asserted in good faith but not established, the court has jurisdiction to enter a personal judgment against a defendant liable upon contract for the services performed by the plaintiff; and the judgment is not erroneous, in the absence of demand for a trial by jury, under Rem. & Bal. Code, § 316, relating to waiver of a jury. *Dolan v. Cain*... 259

LOST INSTRUMENTS:

Evidence of expert as to lost signature, see EVIDENCE, 9.

MACHINERY:

Sale of, see SALES 1, 2, 6-8.
Dangerous machinery and appliances, see MASTER AND SERVANT.

MANDAMUS:

To fix amount of supersedeas bond, see APPEAL AND ERROR, 17.
To compel council to call election for formation of charter, see MUNICIPAL CORPORATIONS, 2.

MARRIAGE:

Relation of husband and wife, privileges and disabilities of coverture, and separation by agreement, see HUSBAND AND WIFE.
Evidence of relation in prosecution for rape, see RAPE, 2.

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Harmless error in giving instructions, see APPEAL AND ERROR, 44, 45.
Liability of carrier for ejection of passenger by servant, see CARRIERS, 4-6.
Inadequate or excessive verdict for injury to servant, see DAMAGES, 7.
Recovery for services, see WORK AND LABOR.

1. MASTER AND SERVANT—EMPLOYMENT—CONTRACT—CONSTRUCTION—TERMINATION—SALARY. A contract of employment for one year, which provided for sixty days' notice in the event of a discharge without fault of the employee, entitled the employee to salary for that period in the event of his summary discharge before the expiration of ten months, or to one year's salary if discharged after ten months. *Johnson v. Pacific Bank & Store Fixture Co.* 58

MASTER AND SERVANT—CONTINUED.

2. SAME. A contract of employment wherein the employee is guaranteed one year's employment, or the expense of moving to the Pacific coast if discharged before the expiration of one year, does not entitle him to more than one year's salary, if discharged during the year. *Johnson v. Pacific Bank & Store Fixture Co.* 58

3. MASTER AND SERVANT—NEGLIGENCE—CONSTRUCTION OF PLATFORM. There is sufficient evidence of negligence in the construction of a platform supporting a donkey engine, which fell upon employees, where it appeared that the foundation was weak and wavering and the platform toppled over several degrees allowing the engine to fall to the ground. *Luper v. Henry* 33

4. MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES—QUESTION FOR JURY. Negligence of the master may be inferred from an accident on the principle of *res ipsa loquitur* and is a question for the jury, where the right-hand wheel of a truck dropped off, injuring a machinist who was assisting in pushing the truck bearing an iron column weighing 1,600 pounds, a number of such trucks having been used in the shop for such purposes indiscriminately for twelve years whenever needed by any of the employees, and the injured servant owing no duty to inspect or keep the same in repair. *Graaf v. Vulcan Iron Works* 325

5. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES—EVIDENCE—QUESTION FOR JURY. The negligence of a master in furnishing a defective wire rope to support a gin pole is for the jury, where there was evidence which, though contradicted, tended to show that the rope broke at a splice, which should be stronger than at any other place if properly spliced, that the defendant was attempting to move a heavier load than usual, and applied the power before plaintiff had released a brake; since there was direct evidence of the breaking of an appliance through the defendant's negligence, and evidence eliminating negligence by the plaintiff and his fellow servants. *LaBee v. Sultan Logging Co.* 341

6. SAME—NEGLIGENCE OF MASTER—DUTY OF SUPERINTENDENCE—EXTRAORDINARY HAZARDS. In such a case the extraordinary hazard created by the weight of the raft—8,000 or 9,000 pounds—the heavy rope, the current of the stream, and the proximity of the falls, placed upon the city an imperative duty of superintendence over common laborers engaged in floating the raft into position under the bridge, for the want of which the city would be liable. *Engelking v. Spokane* 446

7. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE. No question of the master's duty to furnish a safe place to work is involved where a teamster's assistant was injured while holding heavy iron plates improperly loaded on a truck by himself and the driver, the instrumentalities being proper and sufficient and the dangerous method of loading being readily observable. *Mercer v. Lloyd Transfer Co.*. 560

MASTER AND SERVANT—CONTINUED.

8. MASTER AND SERVANT—NEGLIGENCE—WARNING—EVIDENCE — SUFFICIENCY. There was sufficient evidence of negligence to warrant a recovery by a stevedore for injuries sustained in loading a vessel with heavy timbers, where there was evidence that it was the duty of the hatch tender to notify him of the approach of a timber, that the men worked in reliance upon the warning, and none was given to the plaintiff, the hatch tender having deserted his post, and the injury resulted by reason of failure to give the warning. *Norman v. Shipowners Stevedore Co.* 244

9. MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—INSTRUCTIONS. In an action for injuries sustained by an employee through the fall of a negligently constructed platform, it is not error to refuse to instruct that the plaintiff could not recover if his injuries were caused by the negligence of a co-employee, a certain engineer, where the latter was in no way responsible for the accident, and the jury were properly instructed as to nonliability for the acts of fellow servants. *Luper v. Henry*..... 33

10. MASTER AND SERVANT—NEGLIGENCE OF FOREMAN—EXCAVATIONS—FALL OF ROCK—QUESTIONS FOR JURY. The negligence of a foreman in changing a stream of water in hydraulicing a bank of earth is for the jury, where it appears from the testimony of the plaintiff, a laborer engaged about the sluice boxes, that he was directed by the foreman to start a rock down the box, and while so engaged the stream was changed and directed against the bank above him without any warning, dislodging a rock which rolled upon him, although he started to run away as soon as the stream was changed. *Nelson v. Smyth Construction Co*..... 232

11. SAME—FELLOW SERVANTS—COMMON EMPLOYMENT. A teamster and his assistant are fellow servants where they were engaged in the common undertaking of loading heavy iron plates on a truck, both were experienced men, and they conferred together as to the proper manner of loading them. *Mercer v. Lloyd Transfer Co.* 560

12. SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. A machinist does not assume the risk, and is not guilty of contributory negligence, in using a truck for wheeling a heavy iron casting, the wheel of which dropped off, where there were several such trucks in the shop, used indiscriminately for that purpose whenever needed by any of the employees, who took the one most convenient, and where he owed no duty to inspect or keep them in repair. *Graaf v. Vulcan Iron Works* 325

13. MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF NATURAL LAWS—EXTRAORDINARY DANGER—EVIDENCE—QUESTION FOR JURY. Common laborers were not guilty of contributory negligence and did not assume the risk, as a matter of law, in attempting to float a raft under a new city bridge to remove the false work, where it appears that they were instructed to con-

MASTER AND SERVANT—CONTINUED.

struct the raft, to be secured by a two-inch cable to a railroad bridge 200 feet above, and float it down to an end arch of the new bridge, that the raft was carried up and out to the center of the stream by an eddy, and the strength of the current on the cable was sufficient to pull down and submerge the raft with the men upon it, until it could no longer be held; nor can it be said that they had knowledge of and were bound by natural laws, since they were not so obvious as to prompt the instinct of self-preservation, and the dangers were extraordinary and not likely to be appreciated. *Engelking v. Spokane* 446

14. MASTER AND SERVANT—RUNAWAY TEAM—INJURIES TO THIRD PERSONS—EMPLOYMENT OF SERVANT—EVIDENCE—SUFFICIENCY. In an action for injuries caused by a runaway team, evidence that the team belonged to the defendants establishes, prima facie, that they were in defendants' possession, and that the driver was in control of them. *Knust v. Bullock* 141

MATERIALS:

Right to lien for tools and appliances used in work, see MECHANICS' LIENS, 1.

MECHANICS' LIENS:

Liens on logs and lumber, see LOGS AND LOGGING, 2.

Payment to agent for dealer furnishing supplies as defeating right to lien, see PRINCIPAL AND AGENT, 4.

Liens for labor and supplies on railroad, see RAILROADS.

Amendment of statutes, see STATUTES, 1.

1. MECHANICS' LIENS—"MATERIALS"—WHAT CONSTITUTES—TOOLS AND APPLIANCES. Under Rem. & Bal. Code, § 1129, giving a lien to any person performing labor or furnishing material to be used in the construction of any building, ditch, etc., a lien upon the irrigation ditches and power plant of a water company cannot be claimed for tools and appliances used to carry on the work of construction and not intended to enter into and become a part of the structures when completed. *Gilbert Hunt Co. v. Parry* 646

2. SAME—SEGREGATION OF LIENABLE ITEMS. Where an undeterminable portion of the items forming a large part of a claim for a lien are not lienable the lien must fail as to all the items. *Gilbert Hunt Co. v. Parry* 646

3. MECHANICS' LIENS—FORECLOSURE—ANSWER—BUILDING CONTRACTS STIPULATED DAMAGES. An answer in an action to foreclose a mechanics' lien, setting up the affirmative defense of stipulated damages for delay under "the contract" to complete "the building," is not demurrable for failure to set out the contract and more specifically describe the building, where the substance of the contract was stated. *Dickerman v. Reeder* 405

MINES AND MINING:

Valuation of mining property for taxation, see TAXATION, 1.

MINORS:

Injuries from explosion of dynamite caps, see EXPLOSIVES.
Injury to child from hot water barrel, see NEGLIGENCE.

MISCONDUCT:

Of trial judge, see CRIMINAL LAW, 5.
Of jury, see CRIMINAL LAW, 6-8.

MISREPRESENTATION:

See FALSE PRETENSES.
By corporation in sale of shares, see CORPORATIONS, 3-5.
Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 4.

MISTAKE:

Ground for opening or vacating judgment, see JUDGMENT, 2.
Correction of in confirmation of receiver's sale, see RECEIVERS.

MITIGATION:

Of damages on breach of contract, see SALES, 5.

MODIFICATION:

Of contract of sale, see SALES, 4.

MONEY:

Obtaining money under false pretenses, see FALSE PRETENSES.

MONEY RECEIVED:

Recovery of price paid for goods, see SALES, 8.

MONUMENTS:

See BOUNDARIES.

MORTGAGES:

Covenants in deed excepting mortgage lien, see COVENANTS, 1.
Estoppel of mortgagor to deny validity of mortgage, see ESTOPPEL.
Execution against mortgaged property, see EXECUTION.
Delivery in trust as gift *causa mortis*, see GIFTS.
Accrual of action to vacate fraudulent judgment of foreclosure, see LIMITATION OF ACTIONS, 3.
Authority of agent to mortgage, see PRINCIPAL AND AGENT, 3.
Invalidity of foreclosure decree based on substituted service of summons, see PROCESS.

MORTGAGES—CONTINUED.

1. MORTGAGES—ABSOLUTE DEED—EVIDENCE—SUFFICIENCY. The fact that a deed, absolute in form, was intended as a mortgage must be established by clear, satisfactory and convincing evidence, and is not shown where the grantor was indebted to the grantee, and conveyed to a trustee who had full power to sell for the amount of the debt, which was done, and no note or written evidence of the indebtedness was given. *Washington Safe Deposit and Trust Co. v. Lietzow* 281

2. MORTGAGES — CONVEYANCE SUBJECT TO — SUBSEQUENT CREDITORS—PARTIAL RELEASE OF MORTGAGE—EFFECT. Where a portion of mortgaged premises was conveyed subject to the mortgage, subsequent judgment creditors of the mortgagor are entitled to have the mortgage satisfied so far as possible out of the portion so conveyed; and if the mortgagee releases such portion of the mortgaged property, after notice of the judgment creditors' liens upon the balance, the judgment creditors are entitled to priority over the mortgagee in and to the proceeds of the balance of the mortgaged property, to the extent of the value of the property released. *Schaad v. Robinson* 346

MUNICIPAL CORPORATIONS:

Liability of burial lots for assessments for public improvement, see CEMETERIES.

Inadequate or excessive verdict for injuries to pedestrian, see DAMAGES, 8.

Exercise of power of eminent domain, see EMINENT DOMAIN, 7-9.

1. MUNICIPAL CORPORATIONS—FORMATION OF CHARTER — ELECTIONS — TIME FOR HOLDING—DISCRETION—STATUTES. An election to choose fifteen freeholders to prepare a new city charter for cities of the first class, under Rem. & Bal. Code, § 7498, must be called by the city council within a reasonable time after due petition therefor is filed, in view of the failure of the statute to fix the time, and of § 7499, requiring the proposed charter to be submitted at an election to be called "immediately"; hence, the provision of § 7502 that the election may be general or special only vests in the council a discretion to fix upon the next general election in case the same is to occur within a reasonable time. *State ex rel. Lambert v. Superior Court* 670

2. SAME—ABUSE OF DISCRETION—MANDAMUS. Where a city council is petitioned on May 24th to call an election to choose fifteen freeholders to prepare a new city charter, under Rem. & Bal. Code, § 7498, it is an abuse of discretion for the city council to fix the date therefor upon the next general election to be held on the first Tuesday of May, 1911; and mandamus lies to compel the council to fix upon a reasonable time. *State ex rel. Lambert v. Superior Court* 670

MUNICIPAL CORPORATIONS—CONTINUED.

3. SAME—TIME FOR HOLDING—ELECTION — COURTS — POLITICAL QUESTION. The question of the necessity of holding an election to choose freeholders to frame a city charter at an earlier time than one year in the future, is usually a political question not susceptible of proof in a court. *State ex rel. Lambert v. Superior Court* 670

4. MUNICIPAL CORPORATIONS—ORDINANCES—REFERENDUM—PETITION—RIGHT TO WITHDRAW NAME. A person signing a referendum petition, required to be signed by a certain percentage of the voters of a city, has the right to withdraw his name therefrom before the jurisdiction of the officer to whom it is addressed attaches; but not after final action has been taken thereon. *State ex rel. Mohr v. Seattle* 68

5. SAME—NUMBER OF SIGNERS—DETERMINATION. Under Seattle City Charter, art. 4, providing that a certain percentage of the voters may invoke the referendum, and that the city comptroller shall verify the sufficiency of the signatures and transmit it with his report to the city council, whose only duty is to then submit the question to the voters, the sufficiency of the signatures to the petition is to be determined by the city comptroller, and after his report is made a person signing the petition cannot withdraw his name therefrom. *State ex rel. Mohr v. Seattle*..... 68

6. SAME—SUBMISSION OF REFERENDUM — DUTY OF COUNCIL. *Under* art. 4, Seattle City Charter, after a sufficiency of signatures to a referendum petition has been determined by the city comptroller, the city council has no discretion in the matter except to submit the question. *State ex rel. Mohr v. Seattle*..... 68

7. SAME—ACTION TO ENFORCE REFERENDUM—PARTIES—RIGHT TO SUE. A voter and petitioner entitled to sign a referendum petition may maintain an action to compel the city council to act thereon. *State ex rel. Mohr v. Seattle*..... 68

8. MUNICIPAL CORPORATIONS—ORDINANCES—EQUITY—POWERS OF COURT. A court of equity cannot interfere with the enactment of ordinances because it questions their expediency, or the motives of the council, or the regularity of the proceedings. *Broad v. Spokane* 268

9. MUNICIPAL CORPORATIONS—ORDINANCE—VALIDITY. Where an ordinance regulates several kinds of hospitals by provisions that are severable both as to the character of the institutions and the requirements to be met, some of the requirements may be valid and others invalid, or they may be valid as to one kind of an institution and invalid as to another; and it will be upheld in so far as it is valid. *Shepard v. Seattle*..... 363

10. MUNICIPAL CORPORATIONS — ORDINANCE — VALIDITY—MOTIVE—JUDICIAL POWER. A general ordinance, valid on its face, is not rendered void by the fact that it was passed at the solicitation of persons re-

MUNICIPAL CORPORATIONS—CONTINUED.

siding in a certain locality as a local and special regulation; as the motives of the council cannot be inquired into by the courts. *Shepard v. Seattle*..... 363

11. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ABANDONMENT — INJUNCTION—REMEDY AT LAW. A court of equity will not restrain a city council from abandoning a local improvement after entering into a contract therefor, as the contractor has his remedy at law. *Broad v. Spokane*..... 268

12. MUNICIPAL CORPORATIONS — IMPROVEMENTS — EMINENT DOMAIN COMMISSIONERS. The board of eminent domain commissioners created by Rem. & Bal. Code, § 7788, are city officials, and not within Const., art. 11, § 5, requiring all county, township, precinct, or district officers to be elected. *In re Blewett Street, Seattle*..... 485

13. SAME—EMINENT DOMAIN—ASSESSMENT OF LANDS NOT TAKEN—VERDICT. Where a jury in condemnation proceedings for land taken for an improvement found generally that lands not taken were not damaged, the same may be assessed for benefits; and it cannot be shown that the jury merely found that the lands were not damaged in excess of benefits, by oral evidence to the effect that at the trial before the jury it was stipulated that the only issue was whether the lands were damaged in excess of the benefits and that witnesses for the city admitted damage and the jury were instructed that the damage must exceed the benefits; since such evidence and the general verdict, in the absence of special finding, does not necessarily imply that the jury found any actual damage. *In re Blewett Street, Seattle*..... 485

14. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—INJURY TO ABUTTER—LIABILITY OF CITY. Where a city condemned the right to fill lots to a slope of one and one-half feet for each foot of elevation to support the grade of a street, it is liable for injury to a building by the placing of more dirt in the space than was necessary to make the required slope. *Provine v. Seattle*..... 681

15. SAME—ACTS OF CONTRACTOR—LIABILITY OF CITY. Evidence that such grading was undertaken by the city and the fill made by the persons having charge, is sufficient to fix the liability of the city, in the absence of a showing by the city that the work was done by independent contractors not under the city's supervision or control. *Provine v. Seattle*..... 681

16. SAME—INJURY TO ABUTTER—EVIDENCE—SUFFICIENCY. In an action for injury to a building, pushed off its foundations, by filling in more dirt than was necessary to make a required slope, evidence that sixty cubic yards more than was necessary was used, raising the dirt against the building four feet more than it should have been, is sufficient to make a question for the jury and sustain a verdict for the plaintiff. *Provine v. Seattle*..... 681

MUNICIPAL CORPORATIONS—CONTINUED.

17. SAME—CONSENT OF ABUTTER—EVIDENCE—QUESTION FOR JURY. In an action against a city for injury to a building by a fill, upon an issue as to whether plaintiff consented, a question for the jury is presented by the plaintiff's denial of the testimony of the defendant's witnesses. *Provine v. Seattle*..... 681

18. MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—PROCEEDINGS—DEFAULT JUDGMENTS—INCREASE OF ASSESSMENT. In proceedings by a city to levy assessments for a local improvement, where eminent domain commissioners have made up an assessment roll and notice has been given to a property owner of the amount of benefits assessed against his property, and the owner files no objections and does not appear, the court in confirming the assessment has no authority to increase the same; since its order has the effect of a default judgment, the hearing being conducted as in other proceedings, under Rem. & Bal. Code, §§ 7791-7797. *In re Sixth Avenue West, Seattle* 41

19. MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—APPEAL—REVIEW—DISCRETION. Upon an appeal from the confirmation of an assessment for a local improvement, findings as to the boundaries of the lands benefited, and the amount of the benefits, will not be disturbed in the absence of any abuse of discretion. *In re Sixth Avenue West, Seattle* 41

20. SAME—DECISION. Upon appeal from the confirmation of an assessment for a local improvement, where about half of the land was exempt, and the proportion appears of record, the supreme court will order a proportionate reduction. *In re Sixth Avenue West, Seattle* 41

21. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—APPEAL — STATUTES. The act of 1905 (Rem. & Bal. Code, § 7905), entitled an act to validate municipal assessments and to prohibit setting the same aside except for fraud, was not intended to repeal the act of 1901 (Rem. & Bal. Code, § 7552), authorizing an appeal from the confirmation of an assessment by the city council to the superior court, and does not affect such appeals or the procedure therein. *Real Estate Investment Co. v. Spokane*..... 416

22. SAME—PROTESTS—FORM—OBJECTIONS. A notice of appeal from the confirmation of an assessment by a city council may be informal, and is sufficient if it is made to appear that the owner protests against the costs as excessive and disproportionate to the value of the property, and because the benefit is not in proportion to the cost, it only being necessary to clearly state the grounds of the objection. *Real Estate Investment Co. v. Spokane*..... 416

23. SAME—CONFIRMATION OF ASSESSMENT—RESOLUTION OR ORDINANCE—APPEAL. Under Rem. & Bal. Code, § 7532, providing that the city council shall confirm an assessment as corrected by resolution or ordinance, in conformity with the charter, a city council may con-

MUNICIPAL CORPORATIONS—CONTINUED.

firm an assessment by resolution, although another ordinance provides that all orders of confirmation shall be by ordinance, since the power of the council depends upon the general law and the charter; hence an appeal from a resolution confirming an assessment is not premature. *Real Estate Investment Co. v. Spokane*..... 416

24. MUNICIPAL CORPORATIONS—POLICE POWER. In all matters pertaining to the public health and safety, substantially the entire police power of the state is vested in municipal corporations of the first class. *Shepard v. Seattle*..... 363

25. MUNICIPAL CORPORATIONS — POLICE POWER — HOSPITALS — REGULATIONS. Under the police power, a city of the first class may prohibit the maintenance of a private hospital tending to spread contagious diseases in crowded localities, and may require the same to be connected with the sewers of the city. *Shepard v. Seattle*..... 363

26. SAME—NUISANCES—PRIVATE HOSPITALS FOR INSANE. It is a proper exercise of the police power for an ordinance of a city of the first class to declare any private hospital or sanitarium for the treatment of inebriates or persons suffering from insanity or other mental diseases to be a public nuisance, unless its location and maintenance are consented to in writing by the owners of private property situated within 200 feet of the hospital buildings; since it would practically destroy the value of all residential property in its immediate vicinity, and the danger differs in kind rather than in degree. *Shepard v. Seattle* 363

27. SAME—PERMIT FOR PRIVATE HOSPITAL. The provision requiring a written permit from the city commissioners of health, in an ordinance prohibiting the maintenance of a private hospital for the treatment of the insane except under certain conditions, is not objectionable as an unreasonable exercise of the police power. *Shepard v. Seattle* 363

28. MUNICIPAL CORPORATIONS—STREETS—PRIVATE WAYS—DUTY TO REPAIR—CONTRIBUTORY NEGLIGENCE. The driver of an automobile is guilty of contributory negligence in attempting to travel a road, and the road was not a street which the city was bound to repair, where it appears that the way was constructed over private lands by real estate agents who had put up travel signs for their own purposes, that it was five miles from the business portion of the city, in a wild, rough country, and plainly in very bad condition, and that the city had not opened or authorized the opening of the street. *Ottolengui v. Seattle*..... 37

29. MUNICIPAL CORPORATIONS—STREETS—BRIDGES—LIABILITY FOR NEGLIGENCE. The construction of a bridge across a stream is a ministerial rather than a governmental function, for which a city is answerable to its employees for its negligence. *Engelking v. Spokane* 446

MUNICIPAL CORPORATIONS—CONTINUED.

30. MUNICIPAL CORPORATIONS — STREETS — NEGLIGENCE — UNGUARDED DITCH. The negligence of a city in leaving an unprotected ditch in a street, and the contributory negligence of the plaintiff, is for the jury, where it appears that the plaintiff, in order to avoid dangers in a street that was being improved, walked diagonally across an intersecting street to cross vacant lots to her home, and fell into an unguarded ditch of which she had no knowledge, and that the night was dark and the place unlighted. *Pierce v. Spokane*.... 615

31. MUNICIPAL CORPORATIONS — ACTIONS — NOTICE OF CLAIM — SUBSEQUENT RESULTS. The requirement of a city charter that claims for personal injuries shall be filed within thirty days and shall state the nature and extent of the injuries and the amount of the claim is for the purpose of giving timely notice, and does not preclude a recovery for additional injurious results that have developed since the claim was filed and were not known or anticipated at the time. *Pierce v. Spokane*..... 615

MURDER:

See HOMICIDE.

MUTUALITY:

Necessity for mutuality of obligation, see CONTRACTS, 2.

NAMES:

See TRADE-MARKS AND TRADE-NAMES.
Filing certificate showing firm name, see PARTNERSHIP, 3-4.

NAVIGABLE WATERS:

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

NECESSITY:

For condemnation of property, see EMINENT DOMAIN, 1, 4, 5.

NEGLIGENCE:

Of carrier as to passenger, see CARRIERS.
Of passenger, see CARRIERS, 3.
Damages in general, see DAMAGES, 6-8.
Acts and statements accompanying or connected with transaction as constituting part of res gestae, see EVIDENCE, 1-4.
Injuries from accidental explosions, see EXPLOSIVES.
Demised premises, see LANDLORD AND TENANT, 8.
Contributory negligence of servant, see MASTER AND SERVANT, 12, 13.
Risks assumed by servant, see MASTER AND SERVANT, 12, 13.
Of employers, see MASTER AND SERVANT.

NEGLIGENCE—CONTINUED.

Of person injured by defects or obstructions in street, see MUNICIPAL CORPORATIONS, 28.
Liability of cities for torts, see MUNICIPAL CORPORATIONS, 28-31.
In operation of street railroads, see STREET RAILROADS.
Of warehouseman, see WAREHOUSEMEN.

1. NEGLIGENCE—DANGEROUS PREMISES—PLACES ATTRACTIVE TO CHILDREN—HOT WATER BARREL. The owner of a mill was not negligent in the maintenance of a barrel of hot water, so as to be liable for injuries to a child nine years of age, who was scalded when a plug came out while she was attempting to take water from the barrel, where it appears that the barrel was about three feet high covered with a lid, and accessible only from one side, that the plug was an ordinary cedar plug apparently sound, and there was nothing to show how it came to be removed, that the parents of the child had lived in the neighborhood, and with others used the water for domestic purposes, and permitted the child to go there and never anticipated any danger or warned her to keep away. *Gordon v. Snoqualmie Lumber & Shingle Co*..... 272

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWSPAPERS:

Service of process by publication, see PROCESS.

NEW TRIAL:

Effect of motion for new trial on time to appeal, see APPEAL AND ERROR, 13.
Review of orders relating to, see APPEAL AND ERROR, 26-28.
Misconduct of juror as ground for, see CRIMINAL LAW, 6-8.
Misconduct of judge in criminal prosecution as ground for, see CRIMINAL LAW, 5.

1. NEW TRIAL—SUFFICIENCY OF EVIDENCE—PROVINCE OF COURT. Where there is a substantial conflict in the evidence it is discretionary for the trial court to deny a motion for a new trial on the ground of the insufficiency of the evidence to sustain the verdict; and the fair inference from comment of the trial judge to the effect that two juries had believed the plaintiff, that its probative force was for the jury, and that he was compelled to deny a new trial, is that the evidence justified the verdict; especially as the court should be reluctant to grant a new trial for insufficiency of the evidence after two juries had found it sufficient. *Money v. Seattle, Renton & Southern R. Co*..... 120

NEW TRIAL—CONTINUED.

2. NEW TRIAL—DECISION—INCONSISTENCY. It is not inconsistent to grant a new trial upon the ground of insufficiency of the evidence and to refuse to sustain the contention that the verdict was excessive, where the issue was as to the making of a contract and the excessiveness of the verdict depended on such issue. *Faben v. Muir* 250

NOMINAL DAMAGES:

See DAMAGES, 1.

NONRESIDENTS:

Appointment of guardian of estate of insane person, see INSANE PERSONS.

NOTES:

See BILLS AND NOTES.

NOTICE:

Of community character of property, see HUSBAND AND WIFE, 1.
Application to vacate judgment, see JUDGMENT, 3.
To deliver possession of leased premises, see LANDLORD AND TENANT, 9, 10.
Of entry of fraudulent judgment, see LIMITATION OF ACTIONS, 4.
Claim for injury from defects or obstructions in street, see MUNICIPAL CORPORATIONS, 31.
Of appeals from confirmation of assessment, see MUNICIPAL CORPORATIONS, 22.

NUISANCE:

Power of municipality, see MUNICIPAL CORPORATIONS, 26.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see APPEAL AND ERROR, 7-12.
To confirmation of assessment, see MUNICIPAL CORPORATIONS, 22.
To pleadings and waiver thereof, see PLEADING, 4.

OFFICERS:

County officers, see COUNTIES.
Authority to compel witness to produce books and documents, see DEPOSITIONS.
Of city, see MUNICIPAL CORPORATIONS, 12.
State officers, see STATES.
Omission of officer as defeating foreclosure decree, see TAXATION, 3-6.

OPENING:

Judgment, see JUDGMENT, 2, 4, 5.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 9-12.

OPINIONS:

Of witness and impeachment by other statements, see WITNESSES, 2.

OPTION:

To purchase land, see VENDOR AND PURCHASER, 1.
Specific performance of options for land, see SPECIFIC PERFORMANCE, 3.

ORAL AGREEMENTS:

See FRAUDS, STATUTE OF.

ORAL CONTRACTS:

Specific performance, see SPECIFIC PERFORMANCE, 2.

ORAL EVIDENCE:

See EVIDENCE, 7, 8.

ORDERS:

Review of appealable orders, see APPEAL AND ERROR, 1-3.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 4, 8-10.

OWNERSHIP:

Pleading ownership in action of replevin, see REPLEVIN, 1.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

PAROL EVIDENCE:

See EVIDENCE, 7, 8.
To show acknowledgment of instruments, see ACKNOWLEDGMENTS, 2.
To explain contract of bailment, see BAILMENT.

PARTIES:

Persons entitled to appeal, see APPEAL AND ERROR, 4-6.
Rights and liabilities as to costs, see COSTS.
Substitution of parties and parties defendant, see EJECTMENT, 3.
Admissions as evidence, see EVIDENCE, 5.
Enforcing referendum, see MUNICIPAL CORPORATIONS, 7.
Correcting order confirming receiver's sale, see RECEIVERS.
In action to enjoin diversion of waters, see WATERS AND WATER COURSES, 4.

PARTNERSHIP:

Damages for breach of partnership agreement, see DAMAGES, 2.
Authority of partner, see JOINT ADVENTURES.
Notice to quit leased premises signed in firm name, see LANDLORD AND TENANT, 9.

1. PARTNERSHIP—EXISTENCE OF RELATION—ARTICLES — SUFFICIENCY. Written articles of copartnership are sufficient to establish a partnership where it can be determined from the express agreement, or inferred from their acts and conduct, that the parties intended to establish a partnership relation, notwithstanding that certain blanks as to deposits in a bank and division of surplus were not filled up, and a separate agreement relating to their several contributions to the partnership property referred to in the articles was never executed, the blanks being immaterial details, and the law assuming the contributions to be equal in the absence of agreement to the contrary. *Yatsuyanagi v. Shimamura*..... 24

2. PARTNERSHIP—EVIDENCE OF RELATION—SUFFICIENCY. The evidence shows that a partnership relation existed in a saloon business, although the oral evidence is conflicting, where the more convincing part of the testimony is composed of matters of record and bookkeeping, and it appears that plaintiff, who claimed to be a silent partner, advanced $2,229 to buy the business, there was never any understanding as to the rate of interest, and he was paid from time to time dividends out of the net profit, to the amount of $2,100 in two years, each of three parties taking a one-third part; the amounts repaid being inconsistent with the theory of interest on a loan. *Prickett v. Sloggy*..... 481

3. PARTNERSHIP—FIRM NAME—ACTIONS—STATUTE—EFFECT. Rem. & Bal. Code, § 8369, is directed against concealed partnerships, and it is not necessary to plead and show a compliance therewith in order to maintain an action, where the firm name discloses the surnames of the partners. *Bowman v. Harrison*..... 56

4. SAME—CAPACITY TO SUE—WAIVER—DEMURRER. Failure to plead or show a compliance with Rem. & Bal. Code, § 8369, directed against concealed partnerships, goes only to the capacity to sue, and is waived unless raised by demurrer. *Bowman v. Harrison*..... 56

PART PERFORMANCE:

To satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.
Taking contract out of statute of frauds, specific performance of contracts, see SPECIFIC PERFORMANCE, 2.

PASSENGERS:

Who are, see CARRIERS, 1.

PAYMENT:

Of liquor license fee to treasurer by auditor, see COUNTIES, 2.
To agent, see PRINCIPAL AND AGENT, 4.
Taxes, see TAXATION, 3-6.
Of telephone rentals and charges for delinquency, see TELEGRAPHS AND TELEPHONES.

PENALTIES:

Under contracts, see DAMAGES, 1, 4.

PERMIT:

Requiring permit to maintain hospital for insane as reasonable exercise of police power, see MUNICIPAL CORPORATIONS, 27.

PERSONAL INJURIES:

See NEGLIGENCE.
To passenger, see CARRIERS.
Inadequate and excessive damages, see DAMAGES, 6-8.
From explosions, see EXPLOSIVES.
From defective condition of demised premises, see LANDLORD AND TENANT, 8.
To employee, see MASTER AND SERVANT.
From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 28-31.

PETITION:

Invoking referendum, see MUNICIPAL CORPORATIONS, 4-7.

PHYSICIANS AND SURGEONS:

1. PHYSICIANS AND SURGEONS—LICENSE—STATUTES. Rem. & Bal. Code, § 8421, prohibiting the practice of dentistry without a license is not unconstitutional by reason of conflict with the constitution, or by reason of its maladministration by state authority. *Brown v. State* 195

2. PHYSICIANS AND SURGEONS — LICENSE—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 8389, requires that an applicant for a license to practice medicine based upon a diploma and prior practice in this state, as distinguished from one who had been "practicing" in one locality for two years, must have been "legally" engaged in such practice, and does not authorize a license to one who was practicing in this state without any license in violation of the then existing law. *In re Harold* 322

3. PHYSICIANS AND SURGEONS—LICENSE—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, §8389, authorizing persons who desire to treat the sick to register their diplomas and receive a license on the payment of a fee, provided that they show evidence satisfactory to the examining board that they have been "legally" engaged in prac-

PHYSICIANS AND SURGEONS—CONTINUED.

tice prior to the passage of the act, and are graduates of colleges or schools of prescribed qualifications, "or by having been in continuous practice in one locality in this state for the past two years," and § 8406, providing that licensees shall use only such titles as are designated in their diplomas, "or those having no diplomas" only such as are designated in their licenses, an applicant is entitled to a license upon a showing that he has been in continuous practice in one locality for the two years previous to the passage of the act, without any diploma, and although not "legally" engaged in practice as required by the then existing statute making practice without a license a misdemeanor. *In re Christensen*..... 314

PLATS:

See DEDICATION.

PLEA:

In civil actions, see PLEADING.

PLEADING:

See PRINCIPAL AND AGENT, 2.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 35, 43.
For breach of covenant, see COVENANTS, 2.
In action of ejectment, see EJECTMENT, 2.
Alleging death in information, see HOMICIDE, 1.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
To enforce mechanic's lien, see MECHANICS' LIENS, 2.
By or against partners or firms, see PARTNERSHIP.
In replevin, see REPLEVIN, 2.
In action to vacate tax title, see TAXATION, 6.
In action against warehouseman, see WAREHOUSEMEN.

1. PLEADINGS — COMPLAINT—ALTERNATIVE ALLEGATIONS—CONTRACTS —VARIANCE. In an action for railroad construction work done, the plaintiff may plead in the alternative an express contract or an implied contract for the reasonable value, without being subject to an election; and proof of *quantum meruit* would not be a variance. *Holm v. Chicago, Milwaukee & Puget Sound R. Co*..... 293

2. PLEADING—COMPLAINT — SUPPLEMENTAL PLEADINGS—AMENDMENT AFTER DECISION—DISCRETION. In an action for breach of covenant against incumbrances, it is not an abuse of discretion to deny leave to file a supplemental complaint, after a trial before the court without a jury and after the court had orally announced its decision for nominal damages, in order to show payment and discharge of the incumbrances by the plaintiff after the decision was made. *Harsin v. Oman*..... 693

PLEADING—CONTINUED.

3. PLEADINGS—ANSWER—ADMISSIONS. Where a complaint alleges that corporate stock was worth seventy-five cents to one dollar per share, and the answer denies that its value exceeds five cents per share, the value stated in the answer is not admitted and taken as true for want of any reply. *Bell v. Scranton Coal Mines Co*.... 659

4. PLEADING—AMENDMENT—WAIVER OF OBJECTIONS. The allowance of the filing of a so-called supplemental complaint as an amended complaint cannot be urged as error after issue joined and trial and judgment on the merits. *Johnson v. Pacific Bank & Store Fixture Co.* 58

5. PLEADINGS—AMENDMENT AT TRIAL—CONDITIONS—DISCRETION OF COURT. In an action for injuries sustained through an electric shock alleged to have been caused by an electric current from an overhead trolley wire not properly insulated, it is not an abuse of discretion to require a continuance as a condition for allowing the complaint to be amended at the trial to allege that the current came from "other overhead wires," the defendant having asked for time to meet the new issue. *Roberts v. Tacoma R. & Power Co*..... 226

6. PLEADINGS—AMENDMENTS—DAMAGES—ARISING AFTER ACTION. Usually, for the recovery of damages occurring after the commencement of an action, the plaintiff should file an amended or supplemental complaint. *International Development Co. v. Clemans*..... 398

7. SAME—DISCRETION OF COURT. It is not an abuse of discretion to refuse leave to file an amended or supplemental complaint to show damages occurring after the commencement of an action for breach of covenant, where the plaintiff had attached defendant's property when it had no substantial right of action and did not ask leave to amend until after the court had charged the jury at the close of the trial. *International Development Co. v. Clemans*..... 398

8. SAME—AMENDMENTS TO CONFORM TO PROOF. A complaint should not be deemed amended to conform to the proof, so as to permit a recovery outside of the allegations of the complaint, where the proof was objected to, and in amending it the court expressly restricted it to another proper purpose because such recovery was not sought in the complaint. *International Development Co. v. Clemans* 398

PLEDGES:

Of corporate stock, see CORPORATIONS, 1.

POLICE POWER:

Of municipality, see MUNICIPAL CORPORATIONS, 24-27.

POLICY:

Of insurance, see INSURANCE.

POLITICAL QUESTIONS:

Time for holding election, see MUNICIPAL CORPORATIONS, 3.

POSSESSION:

Burden of proof to show right to possession, see REPLEVIN, 1.

PRACTICE:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; JUDGMENT; NEW TRIAL; PLEADING; TRIAL.
Condemnation proceedings, see EMINENT DOMAIN.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 34-45.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 9, 10.

PRESUMPTIONS:

As to ownership of corporate stock, see CORPORATIONS, 6.
As to execution and delivery of deed, see DEEDS, 1.

PRIMARY ELECTIONS:

See ELECTIONS, 2.

PRINCIPAL AND AGENT:

See BROKERS.
Liability of carrier for acts of employees in ejecting passengers, see CARRIERS, 4-6.
Estoppel of agent, see ESTOPPEL.
Liability of agent for placing insurance in insolvent company, see INSURANCE, 1.

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY. There is sufficient evidence that defendant's agent and attorney in fact, who had general authority to build a house, had authority to change or abrogate the written contract entered into by him and to substitute an oral agreement respecting the compensation of the builder, where whatever was done was in the legitimate carrying out of the enterprise for which the agency was created, and the agent, testifying as a witness for the defendant, said that he was the agent and attorney in fact for the defendant in the transactions with the plaintiff. *Driver v. Galland*..... 201

2. SAME—PLEADING—DENIAL—SUFFICIENCY. Where a general denial in a paragraph in a complaint alleged that the defendant through an agent and attorney in fact orally employed plaintiff upon a certain consideration to build a house, a general denial thereof and particularly that any other contract was made than a certain written contract, does not put in issue the authority of

PRINCIPAL AND AGENT—CONTINUED.

the agent to represent the defendant in the transaction, where another paragraph of the complaint alleging that the person was the agent and attorney in fact of the defendant was not denied in the answer. *Driver v. Galland*..... 201

3. PRINCIPAL AND AGENT—POWERS—EXCEEDING AUTHORITY—RIGHTS OF THIRD PERSONS. An objection that a mortgage executed by an attorney in fact is void because the power of attorney only authorized conveyance by quitclaim, can be asserted against the mortgagee only by the principal. *Dimmick v. Sprinkel*..... 329

4. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—DUTY OF THIRD PERSONS—DILIGENCE—MECHANICS' LIENS. Where a company dealing in plumbing supplies had refused an irresponsible contractor credit, and the contractor brought it a check from the owner of a house in course of construction, payable to the dealer, the dealer must use reasonable diligence to ascertain whether the contractor owned the check or was delivering it as agent; and where the contractor, instead of using it to purchase supplies as directed by the drawer of the check, paid off an old account, took the balance in cash, and secured further credit for the supplies needed, the dealer cannot claim a mechanics' lien against the house for the supplies furnished, intended by the owner to be paid for by the check. *Bowles Co. v. Clark*..... 336

PRINCIPAL AND SURETY:

Necessity for bond on appeal, see APPEAL AND ERROR, 14-17.
Bonds of county officers, see COUNTIES.

PRIORITIES:

Between executions and other incumbrances and liens, see EXECUTION.
Between judgment creditors and mortgagee upon conveyance of mortgaged property, see MORTGAGES, 2.
Appropriation of waters for irrigation, see WATERS AND WATER COURSES, 3.

PRIVACY:

Corporate books as privileged trade secrets, see WITNESSES, 1.

PRIVATE ROADS:

Rights of way, see EASEMENTS.

PRIVILEGES:

Books of corporation as privileged trade secrets, see WITNESSES, 1.

PROCESS:

1. PROCESS—SUBSTITUTED SERVICE—KNOWLEDGE OF RESIDENCE—JUDGMENT—VALIDITY. A decree of foreclosure of a mortgage, obtained on publication of a summons mailed to the defendant at Toronto, is void, where the plaintiff knew defendant's address to be at Chicago, and defendant had no knowledge of the suit. *Johnstone v. Peyton* 436

2. SAME—EVIDENCE—SUFFICIENCY. A finding that the plaintiff in a foreclosure suit instituted in 1903 knew the postoffice address of the defendant to be at Chicago, will not be disturbed on appeal, where it appears that he had resided there since the execution of the mortgage, except for about six months in 1892, and defendant testified that he and the plaintiff were intimately acquainted for many years and had occasional correspondence and had met in Chicago on several occasions since his return there, although he was flatly contradicted by the plaintiff. *Johnstone v. Peyton*..... 436

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

Measure of damages for injuries to property, see DAMAGES, 5.
Dedication to public use, see DEDICATION.
Division on granting divorce, see DIVORCE, 4.
Taking for public use, see EMINENT DOMAIN.
Obtaining property by false pretenses, see FALSE PRETENSES.

PROSTITUTION:

1. PROSTITUTION—COMMON PROSTITUTE—DEFINITION. To constitute one a common prostitute under Rem. & Bal. Code, § 2440, making it a crime to live with or accept the earnings of a common prostitute, it is not essential that she submit herself to sexual intercourse for gain. *State v. Thuna*..... 689

2. PROSTITUTION—LIVING WITH PROSTITUTE—INFORMATION—TIME OF OFFENSE—SUFFICIENCY. An information for living with a common prostitute is not insufficient because it charges the offense to have been committed on a single day instead of charging a continuing offense; since so living for one day with intent to continue the relation constitutes the offense. *State v. Thuna*..... 689

PROTESTS:

To confirmation of assessment, see MUNICIPAL CORPORATIONS, 22.

PUBLICATION:

Service of process, see PROCESS.

PUBLIC LANDS:

Appropriation of water rights, see WATERS AND WATER COURSES, 1-3.

1. PUBLIC LANDS — HOMESTEAD — CONVEYANCE BEFORE FINAL PROOF. Under U. S. Rev. St. §§ 2290, 2291, the transfer of any interest in a homestead before final proof, except as expressly authorized by law, is contrary to public policy and void. *Cascade Public Service Corporation v. Railsback*..... 376

2. SAME—RIGHT OF WAY—WATER RIGHTS—STATUTES. The alienation by a homesteader, before final proof, of a right of way for a water flume to convey water for power purposes is void, since it is not within U. S. Rev. St. § 2288, as amended by 26 St. at L. 1097, authorizing the conveyances of a right of way for railroads, canals, reservoirs, or ditches "for irrigation or drainage across it," nor would the conveyance of the "water right" be within said statute. *Cascade Public Service Corporation v. Railsback*..... 376

3. SAME—TRANSFERS RATIFIED AFTER FINAL PROOF—SPECIFIC PERFORMANCE. A contract for the conveyance of an interest in a homestead, void because made before final proof, is not ratified or rendered valid by a tender of performance and the acceptance of part of the purchase price, after final proof, so as to authorize specific performance of the contract, since the plaintiff is relying on the original contract, which was against public policy and unenforcible regardless of consideration by the court of the parties to it. *Cascade Public Service Corporation v. Railsback*..... 376

PUBLIC USE:

Dedication of property, see DEDICATION.
Taking property for public use, see EMINENT DOMAIN, 1-3, 6.

QUESTION FOR JURY:

Negligence in use of dynamite, see EXPLOSIVES.
In action for injuries to servant, see MASTER AND SERVANT, 4, 5, 10, 13.
Consent of owner to fill occasioning injury to building, see MUNICIPAL CORPORATIONS, 17.
Negligence causing collision with vehicle at crossing, see STREET RAILROADS.
Justification for trespass, see TRESPASS.

RAILROADS:

Carriage of goods and passengers, see CARRIERS.
Carriage of passengers on street car, see CARRIERS, 2-4.
Ejection of passengers and intruders, see CARRIERS, 4-6.
Condemnation of right of way for other public use, see EMINENT DOMAIN, 1.
Injuries to persons or property on or near street railway tracks, see STREET RAILROADS.

RAILROADS—CONTINUED.

1. RAILROADS — CONTRACTOR'S LIEN — WAIVER. A subcontractor on railway construction work does not waive his right to claim a lien by stipulating, in a contract headed "Pay for labor and material," that he will pay for all material and labor furnished by him, and save the principal contractors and the railroad company harmless from any loss for work or labor performed or liens arising from or growing out of any act done or suffered by him or his agents or servants; since no waiver of his own lien appears in clear, certain and unequivocal language. *Holm v. Chicago, Milwaukee and Puget Sound R. Co.* 293

RAPE:

1. RAPE—STATUTES—"PREVIOUS CHASTE CHARACTER"—DEFENSES. Under Rem. & Bal. Code, § 2436, making it rape to carnally know a female child between the ages of fifteen and eighteen years and of "previous chaste character," there can be no conviction for an offense committed on a certain date where for months prior thereto the parties had continued sexual relations, without any intervening reformation; and it is immaterial that the prosecutrix was chaste except as to the defendant, "previous chaste character" meaning sexual purity. *State v. Dacke* 238

2. RAPE—DEFENSES—EVIDENCE OF MARRIAGE RELATION—SUFFICIENCY. In a prosecution for the carnal abuse of a child, the fact that she was not married to the principal offender appears indirectly and is sufficiently shown to submit the issue to the jury, where she was under fourteen years of age, a mere school girl, living with her parents and bearing her maiden name, and the fact was not questioned at the trial. *State v. May* 414

3. RAPE—CORROBORATION OF PROSECUTRIX. Upon a charge of accessory to carnal abuse of a child, letters and oral evidence of the defendant may constitute sufficient corroboration of the testimony of the prosecutrix. *State v. May* 414

RATES:

Payment of telephone rentals and charges for delinquency, see TELEGRAPHS AND TELEPHONES.

RATIFICATION:

Of void conveyance of interest in homestead, see PUBLIC LANDS, 3.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 1.
Limitation of actions to recover, see LIMITATION OF ACTIONS, 3, 4.
Trespass on real property, see TRESPASS.
Conveyance, see VENDOR AND PURCHASER.

RECEIVERS:

Appealability of order directing sale, see APPEAL AND ERROR, 3.
Right to appeal from order confirming sale, see APPEAL AND ERROR, 6.
Stay of proceedings on appeal from order directing sale, see APPEAL AND ERROR, 17.

1. RECEIVERS—SALES—CONFIRMATION—CORRECTION OF MISTAKE. Where an order for a receiver's sale provided that the purchaser should receive credit proportionately to the total value of the goods originally listed which had been disposed of between the filing of the inventory and the sale, an order of confirmation giving him credit for the total value at list prices of all goods *now* in the store (except those purchased by the receiver since the inventory), is clearly a mistake and it is the duty of the trial court to correct the same so that he will receive credit only for those *not* now in the store. *National Bank of Commerce v. Kilsheimer & Co*..... 460

2. SAME—PARTIES—ASSIGNEE OF PURCHASER. Upon motion to correct an order of confirmation of a receiver's sale, a person recited in the order of confirmation to be the assignee of the purchasers stands in the place of the purchasers. *National Bank of Commerce v. Kilsheimer & Co*..... 460

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 18-22.
Compelling witness to produce books and documents, see DEPOSITIONS.

REFERENDUM:

Petition and signatures thereto, see MUNICIPAL CORPORATIONS, 4-7.

REFORMATION OF INSTRUMENTS:

Of unacknowledged lease, see ACKNOWLEDGMENTS, 2.

RELEASE:

Partial release of mortgage, see MORTGAGES, 2.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 47, 48.

REMOVAL:

Time for removal of standing timber, see LOGS AND LOGGING, 1.

RENT:

See LANDLORD AND TENANT, 4-7.

Payment of rentals and charges for delinquency, see TELEGRAPHS AND TELEPHONES.

REPEAL:

Of criminal statutes and effect of savings clause, see CRIMINAL LAW, 1, 2.

Of statute, see STATUTES, 2.

REPLEVIN:

1. REPLEVIN—PLEADING—OWNERSHIP—BURDEN OF PROOF. In replevin an affirmative answer of ownership in the defendant is nothing more than a denial of plaintiff's allegation of ownership, and the burden of proof is upon the plaintiff to show title in himself or right to possession. *Moore v. Marsh* 151

2. REPLEVIN—RELIEF—PLEADING—COURTS—JURISDICTION. In an action of replevin to recover property sold conditionally, upon which plaintiff claimed a default and a balance due, the court, upon finding a sum due less than the amount claimed, has jurisdiction to decree the usual judgment in replevin in favor of the plaintiff, unless the defendant, within ten days, pays the amount found to be due, with costs and attorney's fees, although the payments made and the balance found did not equal the contract price of the goods sold; especially where the real controversy was over the amount due, if any, and whether the property sold had all been delivered; since property sold conditionally is held only for security, and the relief granted was equitable, and the court may grant any relief consistent with the case made by the pleadings. *Standard Furniture House v. Burrows* 455

REQUESTS:

For instructions in civil actions, see TRIAL, 2.

RESCISSION:

Of contract for sale of goods, see SALES, 4.

Of contract for sale of land, see VENDOR AND PURCHASER, 2-4.

RES GESTAE:

In civil actions, see EVIDENCE, 1-4.

RES IPSA LOQUITUR:

See MASTER AND SERVANT, 4.

RES JUDICATA:

See JUDGMENT, 4.

Divorce decree as bar, see DIVORCE, 5.

RETREAT:

Duty to retreat before taking life, see HOMICIDE, 3, 4.

REVENUE:

See TAXATION.

REVIEW:

By higher court on appeal for errors or irregularities, see APPEAL AND ERROR,

In criminal prosecution, see CRIMINAL LAW, 9, 10.

RIGHT OF WAY:

Easements, see EASEMENTS.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 3.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 12, 13.

ROBBERY:

Conviction of lesser offense on charge of assault with intent to rob, see INDICTMENT AND INFORMATION, 1.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 7.

SALARY:

Of employee upon wrongful discharge, see MASTER AND SERVANT, 1, 2.

SALES:

Of corporate stock, see CORPORATIONS, 2, 5.
Parol evidence to explain contract of sale, see EVIDENCE, 8.
On execution, see EXECUTION.
To satisfy statute of frauds, see FRAUDS, STATUTE OF, 3.
Interest allowed upon demand for goods sold, see INTEREST.
Of standing timber, see LOGS AND LOGGING, 1.
Receiver's sales, see RECEIVERS.
Tax sales, see TAXATION, 2-6.
Of real property, see VENDOR AND PURCHASER.

1. SALES—CONTRACTS—ENTIRE OR SEVERABLE. A contract of sale of one band resaw and one self-feed ripsaw is severable and not entire, although only one price was fixed for the two machines, where such intent appears from the whole contract, which warranted one of the machines, money paid to be refunded if not as guaranteed, and provided that retention of the other machine after sixty days

SALES—CONTINUED.

should constitute a trial and acceptance, the sale of one machine being absolute and the other conditional. *Berlin Machine Works v. Miller* 572

2. SALES—ACCEPTANCE—SEVERABLE CONTRACT. Where a contract for the sale of two machines was severable, the acceptance of one does not work an acceptance of the other. *Berlin Machine Works v. Miller* 572

3. SALES—CONTRACTS—CONSTRUCTION—DELIVERY—"REQUIRE." A contract for the sale of stone of varying thickness and dimensions according to plans and specifications, to be delivered in such quantities as may be "required" not exceeding a specified limit, is not breached by the vendor for want of delivery, where no demand was made specifying the dimensions of the stone; "require" in this instance meaning demanded as of right rather than needed. *Duhamel v. Port Angeles Stone Co*..... 171

4. SALES—CONTRACTS—RESCISSION. A contract to sell fish during a season is not rescinded by a letter written by the seller to the purchaser before the season began offering to rescind the contract, where the seller made no reply to the letter. *Parks v. Elmore*..... 584

5. SALES—BREACH BY PURCHASER—DAMAGES—MITIGATION. It cannot be urged that a recovery for breach of contract to purchase fish, which the seller had to destroy, was excessive, because the plaintiff might by diligence have disposed of the same for some price at a certain cannery, where the fish were offered to the defendant from day to day with notice of the disposition that would have to be made of them, and defendant did not notify the plaintiff of any market for them. *Parks v. Elmore*..... 584

6. SALES—ACCEPTANCE—USE AFTER REGULATION. The use of a guaranteed saw for five months after its rejection does not constitute an acceptance, where it was unable to do the heavy work for which it was guaranteed, and the vendor did not exercise its option to repay freight and remove it from the vendee's premises, but attempted to correct the defect to make it comply with the guaranty, and never formally tendered it to the vendee. *Berlin Machine Works v. Miller*..... 572

7. SALES—GUARANTY—PREFERENCE. A guaranty that a saw would cut a given quantity from given materials in a certain time is not fulfilled by the fact that it could cut an equivalent quantity from materials different from those described. *Berlin Machine Works v. Miller* 572

8. SALES — RECOVERY OF PRICE — PARTIAL PERFORMANCE — SEVERABLE CONTRACTS. Where a sale of two machines for one price was severable, and one of the machines was accepted and used and the other rejected because not up to the guarantee, the vendor may recover the

SALES—CONTINUED.

price of the accepted machine, according to the list prices of the two machines, or a fair proportion of the contract price, to be determined by the court. *Berlin Machine Works v. Miller*..... 572

SCAFFOLDS:

Master's liability for injuries received from defective scaffold, see MASTER AND SERVANT, 3, 9.

SEGREGATION:

Of lienable items in claim for lien, see MECHANICS' LIENS, 2.

SELF-DEFENSE:

Defense in prosecution for homicide, see HOMICIDE, 2-4.

SERVANTS:

See MASTER AND SERVANT.

SERVICE:

See WORK AND LABOR.
Of process, see PROCESS.

SETTLEMENT:

Bona fide settlement prerequisite to appropriation of waters for irrigation, see WATERS AND WATER COURSES, 1-3.

SHIPPING:

Authority of partner in joint venture, see JOINT ADVENTURES.

SIGNATURES:

Determining number in referendum petition, see MUNICIPAL CORPORATIONS, 5, 6.

SPECIFIC PERFORMANCE:

Of contracts of decedents, see EXECUTORS AND ADMINISTRATORS, 3.
Of contract for conveyance of interest in homestead before final proof, see PUBLIC LANDS, 3.

1. SPECIFIC PERFORMANCE—RIGHT TO—DEFAULT IN PAYMENT. Equity will not decree a specific performance of a contract to convey land at the suit of a vendee who was in default in making payments, without any excuse for the failure, and time being of the essence of the contract. *Kiefer v. Carter Contracting & Hauling Co*.... 108

2. SPECIFIC PERFORMANCE — FRAUDS, STATUTE OF — PART PERFORMANCE—DILIGENCE—EVIDENCE—SUFFICIENCY. There is no such part performance of an oral contract for the purchase of land as to take the case out of the operation of the statute of frauds and entitle a vendee to specific performance, when the testimony in rela-

SPECIFIC PERFORMANCE—CONTINUED.

tion to the contract is uncertain and misty, and it appears that the vendees were not diligent in their performance of the contract, the vendees having failed to pay as agreed, but continuing to pay rent for two years and eight months, and having stated that they were unable to make the purchase. *Towner v. Blue*..... 164

3. SPECIFIC PERFORMANCE—OPTIONS—PRICE—ARBITRATION — DETERMINATION OF VALUE. Specific performance may be decreed of an option to purchase land at a reasonable price, although it provides for an appraisement by two arbitrators, and if they cannot agree, by a third selected by them; and where the arbitrators are unable to agree upon the value or to select a third arbitrator, the value may be fixed by the court. *Richardson v. Harkness*..... 474

4. SPECIFIC PERFORMANCE—TITLE OF DEFENDANT—EVIDENCE — SUFFICIENCY. Specific performance of a contract to convey a ten-acre tract, sold to plaintiffs by the defendant, cannot be decreed where defendant had no title thereto; holding simply an option on forty acres of which the ten-acre tract was a part, which option was not paid up; the price realized from the sale to the plaintiff being insufficient to pay up defendant's option and obtain title to the land, and defendant's vendor being unwilling to convey to defendant until the whole forty acres was paid for. *Wright v. Suydam*..... 530

5. SAME—ALTERNATIVE RELIEF—DAMAGES. Damages for breach of contract to convey land cannot be awarded in an action brought for specific performance, where, to the knowledge of the plaintiff, the facts did not at any time warrant a decree for specific performance. *Wright v. Suydam*..... 530

6. SPECIFIC PERFORMANCE — DISMISSAL OF SUIT — FORM OF DECREE. Upon denying specific performance of a contract to convey land because of want of title in the vendor, dismissal of the action should be without prejudice, especially where the vendor's title may be perfected or the vendee may be entitled to other relief under the contract. *Wright v. Suydam*..... 530

SPEED:

Opinion evidence as to speed of street car, see EVIDENCE, 12.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 20, 21.
Of party as evidence, see EVIDENCE, 1-5.
By witness inconsistent with testimony, see WITNESSES, 2, 3.

STATES:

1. STATES—STATE OFFICERS—VACANCY—EXPIRATION OF TERM. Under Const., art. 3, § 13, providing that a vacancy in a state office not otherwise provided for shall be filled by the governor by appointment "which shall expire when a successor shall have been elected

STATES—CONTINUED.

and qualified," the constitution not providing in direct terms for elections to fill vacancies except in the offices of supreme and superior court judges, an appointment to fill a vacancy in the office of secretary of state is for the balance of the term for which his predecessor was elected, or until the next general election for state officers, fixed by the constitution at every fourth year. *State ex rel. Fish v. Howell*..... 492

STATUTES:

See FRAUDS, STATUTE OF; PHYSICIANS AND SURGEONS; RAPE.

Lien for care of livestock, see ANIMALS.

Exemption of burial lots from taxation, see CEMETERIES, 3.

Repeal of criminal statutes and effect of savings clause, see CRIMINAL LAW, 1, 2.

Scope and extent of provision requiring first and second choice voting at primary elections, see ELECTIONS.

Delegation of power of eminent domain, see EMINENT DOMAIN, 2.

Construction of act granting relatives letters of administration, see EXECUTORS AND ADMINISTRATORS, 2.

Fish laws, see FISH.

Construction of act providing for appointment of guardian for estate of insane persons, see INSANE PERSONS.

Statutes of limitation, see LIMITATION OF ACTIONS.

Assessment for public improvements, see MUNICIPAL CORPORATIONS, 22.

Calling election for formation of new charter, see MUNICIPAL CORPORATIONS, 1.

Conveyance of right of way through homestead before final proof, see PUBLIC LANDS.

1. STATUTES—ENACTMENT—AMENDMENTS — CONSTITUTIONAL RESTRICTIONS—MECHANICS' LIENS. Constitution, art. 2, § 37, providing that no act shall be revised or amended by mere reference to its title, but the act shall be set forth in full as amended, does not apply to an act complete and perfect in itself, although it amends by implication or is a substitute for a section in a former law on the same subject; and hence is not violated by the act of 1909, entitled an act relating to materialmen's liens and the enforcement thereof (Rem. & Bal. Code, § 1133), providing for the service upon the owner of duplicate statements of all materials furnished for the construction of buildings, etc. *Spokane Grain & Fuel Co. v. Lyttaker*..... 76

2. STATUTES—TITLE AND SUBJECTS—VETO OF PART—REPEAL DEPENDENT UPON AFFIRMATIVE PART. The governor's powers in the exercise of the veto being limited by the constitutional restrictions upon legislative powers, he cannot veto all the affirmative legislation in an act and approve a section repealing all inconsistent laws, where the repeal was dependent upon the affirmative legislation, and was not included in the title of the act except as connected with the vetoed affirmative sections. *Spokane Grain & Fuel Co. v. Lyttaker*.... 76

STIPULATIONS:

In contracts as to liquidated damages or penalties, see DAMAGES, 2, 3.

STOCK:

Corporate stock, see CORPORATIONS, 1-6.

STOCKHOLDERS:

Holders of corporate stock and liabilities, see CORPORATIONS, 1-6.

STORAGE:

See WAREHOUSEMEN.

STREET RAILROADS:

Injuries to passengers, see CARRIERS, 2, 3.

Opinion evidence as to rate of speed, see EVIDENCE, 12.

1. STREET RAILROADS—COLLISION AT STREET CROSSINGS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for injuries to horses and a furniture van in a collision with a street car, the negligence of the motorman, and the contributory negligence of the driver of the team, are for the jury, where there was evidence to the effect that the driver of the van, traveling about fifteen feet from and parallel to the track, looked back before attempting to cross the track at a street crossing, and saw no car approaching because he could see back only about half a block on account of the curtains on the van, that the car was approaching from behind at the rate of twenty-five miles an hour, without bell or signal, and not under control, at a street crossing in a well-settled portion of the city where the speed limit was ten miles an hour, and struck one of the horses before the team could be turned back, carrying the horse fifty-five feet and running twenty feet further before it was stopped. *Tecklenburg v. Everett R. Light and Water Co*..... 384

STREETS:

See MUNICIPAL CORPORATIONS, 28-30.

SUBLETTING:

Construction of covenants in sublease, see LANDLORD AND TENANT, 3.

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 1, 3, 4.

SUBSTITUTION:

Of owner as party defendant, see EJECTMENT, 3.

SUIT MONEY:

Allowance on granting divorce, see DIVORCE, 3.

SUMMONS:

See PROCESS.

SUPERINTENDENCE:

Duty of master to superintend hazardous work, see MASTER AND SERVANT, 6.

SUPERSEDEAS:

On appeal or writ of error, see APPEAL AND ERROR, 15-17.

SUPPLEMENTAL PLEADING:

See PLEADING, 2, 4, 6, 7.

SURGEONS:

See PHYSICIANS AND SURGEONS.

TAXATION:

Liability of burial lots for local improvement assessments, see CEMETERIES.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 13, 18-23.

1. TAXATION—ASSESSMENTS—EXCESSIVE VALUATION. A valuation of $50,000 for the purposes of assessment for taxation, upon 276 acres of land, chiefly valuable for limestone deposits, is excessive and constructively fraudulent, and should be reduced to $15,000, where the assessor stated that he was unable to fix the value of mineral land unless it was tested or developed, the value did not exceed $3 to $5 per acre aside from the limestone, and the land had not been developed and a few years ago had sold for $10,000; and an offer of $50,000 made and refused is not a sufficient basis upon which to fix the valuation, where the offer was coupled with a condition that six or seven thousand dollars be expended in development work and the land be demonstrated to contain sufficient limestone to operate a cement plant of 1,000 barrels capacity per day for twenty one years. *Case v. San Juan County*..... 222

2. TAXATION—FORECLOSURE—TAX SALE—VACATION — GROUNDS. Sufficient cause is shown for the vacation of a tax judgment and sale, on petition made within one year, and it is error to deny the same, where it appears that the petitioner lived on the land and had made a good faith effort to ascertain and pay the back taxes prior to the issuance of a delinquency certificate, but was prevented by the act of the county treasurer, and he had had no notice of the suit, summons by publication having been made in a paper of limited circulation at a considerable distance from the property. *Brewer v. Howard* 580

TAXATION—CONTINUED.

3. TAXATION—TAX TITLE—VACATION — PAYMENT OF TAX — OMISSION OF TAXING OFFICER. A tax foreclosure and deed is void where the owners, in an honest attempt to pay the taxes, delivered to the county treasurer a list of the property and blank checks with authority to fill in the same for the amount, and through an error of the treasurer, not known to the owners, taxes on part of the property were not paid. *Puget Sound National Bank v. Biswanger*..... 134

4. SAME—TAX RECEIPT. In such a case actual payment is made, and the tax receipt given is only evidence of payment and is immaterial. *Puget Sound National Bank v. Biswanger*..... 134

5. SAME. Where taxes on part of the lands had in past years been paid by a lessee in possession, and the owner gave the county treasurer sufficient to pay all the taxes, he is not bound to notice an obscure annotation in the tax receipt stating, "less pt. to O. I. Co.," as disclosing the mistake of the county treasurer in excepting part of the lands. *Puget Sound National Bank v. Biswanger*..... 134

6. TAXATION—ACTION TO SET ASIDE TAX TITLE—PLEADING—AMENDMENT—WAIVER. In an action to set aside a tax title, it is not an abuse of discretion to allow a complaint alleging excusable neglect in paying the taxes to be amended to allege payment and a mistake of the county treasurer, where no application for a continuance was made. *Puget Sound National Bank v. Biswanger*..... 134

TELEGRAPHS AND TELEPHONES:

1. TELEPHONE COMPANIES—RATES — MAXIMUM — CHARGES OF DELINQUENCY. The rule of a telephone company that its rentals shall be payable monthly in advance, and 50 cents added as a collection fee if not paid on the tenth of the month, is a reasonable rule which such a company may enforce as a public service corporation; and the fifty-cent fee is not in addition to the maximum charge allowed by its franchise, but is a reasonable regulation and charge for default and delinquency, *State ex rel. MacMahon v. Independent Telephone Co.* 156

TENDER:

Of conveyance by vendor of land, see VENDOR AND PURCHASER, 3.

TERMINATION:

Of tenancy and notice to quit, see LANDLORD AND TENANT, 9, 10.

Wrongful discharge of employee and right to salary, see MASTER AND SERVANT, 1, 2.

THEORY OF THE CASE:

As determining scope and extent of review, see APPEAL AND ERROR, 25.

TIMBER:

Cutting logs, see LOGS AND LOGGING.

TIME:

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 13.
For filing case or statement of facts on appeal, see APPEAL AND ERROR, 20, 21.
For holding elections, see ELECTIONS, 1.
Filing informations, see INDICTMENT AND INFORMATION, 2.
Duration of judgment lien, see JUDGMENT, 5, 6.
For application to vacate judgment, see JUDGMENT, 3.
For filing landlord's lien on crops for rent, see LANDLORD AND TENANT, 6.
Computation of period of limitation, see LIMITATION OF ACTIONS.
Removal of standing timber, see LOGS AND LOGGING, 1.
For holding election to choose freeholders to prepare new city charter, see MUNICIPAL CORPORATIONS, 1-3.
Alleging time of commission of offense, see PROSTITUTION, 2.
Duration of appointment upon vacancy in office, see STATES.
Recovery by employee for time lost through sickness, see WORK AND LABOR.

TITLE:

Pleading title in another as defense, see EJECTMENT, 2.
Of purchaser at execution sale, see EXECUTION.
Burden of proof to show title, see REPLEVIN, 1.
Of vendor to maintain specific performance, see SPECIFIC PERFORMANCE, 4, 6.
Of statutes, see STATUTES, 2.

TORTS:

See NEGLIGENCE; TRESPASS.
In carriage of passengers, see CARRIERS.
By corporate officers, see CORPORATIONS, 4, 5.
Damages, inadequate or excessive, see DAMAGES, 5-8.
Injuries from explosives, see EXPLOSIVES.
Injuries from defective or dangerous condition of demised premises, see LANDLORD AND TENANT, 8.
Computation of period of limitation, see LIMITATION OF ACTIONS.
Of cities, see MUNICIPAL CORPORATIONS, 28-31.
Agents, see PRINCIPAL AND AGENT, 4.
Injuries caused by operation of street cars, see STREET RAILROADS.
By warehouseman, see WAREHOUSEMEN.
Diversion of natural water courses, see WATERS AND WATER COURSES, 4.

TRADE-MARKS AND TRADE-NAMES:

1. TRADE-MARKS AND TRADE-NAMES — CORPORATIONS — RIGHT TO USE NAME—FRAUD—INJUNCTION. A corporation organized in this state under the name of "Eastern Outfitting Company" for the purpose of

TRADE-MARKS AND TRADE-NAMES—CONTINUED.

selling cloaks, suits and men's clothing, has no exclusive right to the use of the name throughout the state for that purpose; and where its business has been confined to a retail and mail order business in the vicinity of Seattle, it will be enjoined from opening a branch house under the same name in Spokane, for the purpose of defrauding the public and a copartnership that had for several years been doing the same kind of business under the same name in the city of Spokane, where there had been no confusion theretofore owing to the fact that neither had invaded the territory of the other. *Eastern Outfitting Co. v. Manheim*..... 428

2. SAME—UNFAIR COMPETITION—INJUNCTION—RELIEF. In such a case, the corporation (which was first in the use of the name) is not entitled to an injunction preventing the further use of the trade-name by the copartnership; since protection to a trade-name is only coextensive with the market, and there cannot be unfair trade competition unless there is competition. *Eastern Outfitting Co. v. Manheim* 428

3. SAME—TRADE-NAME—CORPORATIONS—NAMES. The name of a corporation is not its trade-mark, as the latter refers to the thing sold, and a trade-name embraces both the thing and the individuality of the seller. *Eastern Outfitting Co. v. Manheim*..... 428

TRADE SECRETS:

Corporate books privileged as trade secrets, see WITNESSES, 1.

TRESPASS:

Restraining trespass, see INJUNCTION, 1.

1. TRESPASS—JUSTIFICATION—EVIDENCE—QUESTION FOR JURY. In an action for trespass in sluicing and removing earth from plaintiff's lots, it cannot be said, as a matter of law, that plaintiff's removal from the premises to a house furnished by the defendants and permitting the work to go on, established that the work was done under a contract and that plaintiffs assented thereto, where the evidence on this issue was conflicting. *Buyken v. Lewis Construction Co.*. 220

TRIAL:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 7-12.

Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 18-22.

Scope and extent of review as dependent on mode of trial below, see APPEAL AND ERROR, 25.

Review of findings in trial by court, see APPEAL AND ERROR, 30-33.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 34-45.

Instructions in action by passenger for assault, see CARRIERS, 6.

TRIAL—CONTINUED.

Continuance in civil actions, see CONTINUANCE.
In criminal prosecutions, see CRIMINAL LAW.
Instructions in action for injury to servant, see MASTER AND SERVANT, 9.
Motions and grounds for new trial, see NEW TRIAL.
Amendment of pleadings at trial, see PLEADING, 5.
Attendance and examination of witnesses, see WITNESSES.

1. TRIAL—INSTRUCTIONS. Error cannot be predicated on instructions isolated from their context, if the charge as a whole is correct. *Olmstead v. Olympia* 147

2. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse requests for instructions covered by the instructions given. *Tecklenburg v. Everett R. Light and Water Co.* 384

3. TRIAL—INSTRUCTIONS—ISSUES—EVIDENCE. An instruction relating to continuous snow and freezing weather is warranted by the evidence that dry snow began at 6: 30 o'clock in the morning and continued until 6 o'clock in the evening, and that the highest temperature during the day was 22 degrees. *Caywood v. Seattle Electric Co.* 566

4. TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. An instruction as to the rule to be applied by the jury "if they find" that there was continuous snow and freezing weather during the day does not assume that such was the fact. *Caywood v. Seattle Electric Co.* ... 566

5. TRIAL—INSTRUCTIONS—TAKING QUESTION FROM JURY. The question of negligence on other points is not taken from the jury by an instruction which states that a special finding will be submitted on one question, where the other questions were submitted on other instructions. *Caywood v. Seattle Electric Co.* 566

6. TRIAL—VERDICT—SPECIAL VERDICTS. A general verdict against a city for injuries sustained through a defect in a planked street is not contradicted or controlled by a special finding to the effect that the defect, if seen by an ordinarily prudent man prior to the accident, was not such as to lead him to anticipate that an accident was likely to result; since the interrogatory was general and applicable to several classes of persons and not sufficiently restricted to the circumstances of the case. *Olmstead v. Olympia.* 147

TROVER AND CONVERSION:

Misappropriation of corporate funds by officer, see CORPORATIONS, 4, 5.

TRUSTS:

Delivery in trust as gift *causa mortis*, see GIFTS.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 9, 10.

VACANCY:

As affecting elections, see ELECTIONS, 1.
Appointment to state office and duration of term, see STATES.

VACATION:

Of judgment, see JUDGMENT, 2, 4, 5.
Of fraudulent foreclosure judgment and accrual of action, see LIMITATION OF ACTIONS, 3.
Tax sale, see TAXATION, 2-6.

VALUE:

Of land or buildings appropriated for public use as measure of compensation, see EMINENT DOMAIN, 7, 11.
Determination of value of land by court, see SPECIFIC PERFORMANCE, 3.
Determination of value of property for purpose of taxation, see TAXATION, 1.

VARIANCE:

Between pleading and proof in civil actions, see PLEADING, 1.

VENDOR AND PURCHASER:

Sale of cemetery lands, see CEMETERIES.
Purchasers at sale on execution, see EXECUTION.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1.
Sale of community property, see HUSBAND AND WIFE.
Purchaser at receiver's sale, see RECEIVERS.
Transfers of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.

1. VENDOR AND PURCHASER—OPTIONS—CONSIDERATION. An option in favor of a lessee to purchase the land at any time during the life of the lease is supported by a sufficient consideration. *Richardson v. Harkness* 474

2. VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—DEFAULT—RESCISSION BY VENDOR. The vendor exercises his option to rescind a contract for the sale of land, and his acts are notice of his intent, where the contract provided for two annual payments, and on failure of the vendee to make the first payment, the vendor mailed written notice of his election to forfeit the contract (which was not received), and later gave verbal notice, and leased the premises to tenants who erected improvements and materially changed the character of the use and possession of the premises. *Kiefer v. Carter Contracting & Hauling Co.* 108

3. SAME—FORFEITURE—PREREQUISITES—TENDER. A tender of a deed is not a prerequisite to the vendor's right to declare a forfeiture of contract for the sale of land, where default was made in the first payment to be made, as there were no mutual and dependent covenants as in the case of the last payment. *Kiefer v. Carter Contracting & Hauling Co.* 108

VENDOR AND PURCHASER—CONTINUED.

4. VENDOR AND PURCHASER—RESCISSION—FRAUD. The purchasers of an orchard are entitled to a rescission of the contract for fraud by the vendor in representing that it contained 70 acres in orchard when it contained less than fifty acres, and it appears that the area in orchard was very difficult of determination except by an accurate survey, that the vendors were or should have been familiar with the facts, having worked the farm for thirty years, while the purchasers relied on the representations, were entirely unfamiliar with the fruit business, and sought a rescission as soon as they suspected and ascertained the truth. *Best v. Offield*. 466

VERDICT:

Review of objection as dependent on presentation of same in lower court, see APPEAL AND ERROR, 7, 8.
Review on appeal or writ of error, see APPEAL AND ERROR, 29.
In criminal prosecutions, see CRIMINAL LAW, 6-8.
Inadequate or excessive verdict, see DAMAGES, 5-8.
In condemnation proceedings, see EMINENT DOMAIN, 13.
In condemnation proceedings, land not taken, see MUNICIPAL CORPORATIONS, 13.
In civil actions, see TRIAL, 6.

VETO:

Of part of statute, see STATUTES, 2.

VOTERS:

Enforcing referendum and right to sue, see MUNICIPAL CORPORATIONS, 7.

WAIVER:

See ESTOPPEL.
Of objections by contractor to allowance for extras, see CONTRACTS, 6, 7.
Defects or objections to indictment and information, see INDICTMENT AND INFORMATION, 2.
Of trial by jury, see LOGS AND LOGGING, 2.
Of objections to capacity to sue, see PARTNERSHIP, 4.
Of objections to filing supplemental complaint, see PLEADING, 4.
Of contractor's lien, see RAILROADS.

WAREHOUSEMEN:

1. WAREHOUSEMEN—NEGLIGENCE—DEFENSES—PLEADING — ISSUES. In an action against a warehouseman for loss sustained by reason of negligence in failing to keep beef in cold storage at a proper temperature, an answer, affirmatively alleging that it was agreed in renting the cold storage room to plaintiff that plaintiff should have

WAREHOUSEMEN—CONTINUED.

complete control and possession of the room and should and did direct its refrigeration, raises the issue that the loss occurred through the plaintiff's fault. *Patterson v. Wenatchee Canning Co.* 556

WARNING:

Duty to warn servant of danger, see MASTER AND SERVANT, 8.

WARRANTY:

Covenants of, see COVENANTS.
In policy of fire insurance, see INSURANCE, 4-7.

WATERS AND WATER COURSES:

Exercise of power of eminent domain, see EMINENT DOMAIN, 1, 4-6.
Conveyance by homesteader of way for flume before final proof, see PUBLIC LANDS.

1. WATERS AND WATER COURSES—APPROPRIATION—INDIAN RESERVATIONS—SETTLEMENT. No right to appropriate the waters of a creek for irrigation within an Indian reservation could antedate the opening of the reservation to settlement, nor could it antedate actual *bona fide* settlement upon contiguous lands capable of being irrigated thereby. *Avery v. Johnson* 332

2. SAME—BONA FIDE SETTLEMENT. A speculating squatter on relinquished government land, who made no entry on his own behalf during two years, is not a *bona fide* settler and is not entitled to appropriate waters for irrigation. *Avery v. Johnson* 332

3. SAME—PRIORITY. Where the first appropriator of water on public land has perfected his title, and proceeded with reasonable diligence in extending his cultivated area, he is entitled to the quantity of water needed to irrigate his land to the exclusion of subsequent appropriators or riparian owners. *Avery v. Johnson*..... 332

4. WATERS AND WATER COURSES—DIVERSION—INJUNCTION—PARTIES. In an action to enjoin the diversion of waters of a creek by a riparian owner and for damages, there is no defect of parties defendant because the plaintiff failed to join upper appropriators of the waters. *Beck v. Bono* 479

WILLS:

Disposition of property by gift *causa mortis*, see GIFTS.

WITHDRAWAL:

Of names on referendum petition, see MUNICIPAL CORPORATIONS, 4, 5.

WITNESSES:

Absence of witnesses as ground for continuance, see CONTINUANCE.
Fees as costs, see COSTS.
Attendance and production of books and documents, see DEPOSITIONS.
Expert testimony as to value of land, see EMINENT DOMAIN, 11.
Opinions, see EVIDENCE, 9-12.

WITNESSES—CONTINUED.

1. WITNESSES—PRIVILEGE—RIGHT OF PRIVACY—TRADE SECRETS—CORPORATIONS. The books of a corporation are not privileged from being produced in court on a subpoena *duces tecum*, on the ground that they are trade secrets, as a trade secret means an unpatented secret formula or process for compounding or manufacturing the article, and does not apply to merely private books or writings of a corporation. *In re Bolster* 655

2. WITNESSES—IMPEACHMENT—OPINIONS—ADMISSIBILITY. It is not competent to rebut the statements of a witness giving his opinion as to the cause of an accident, admitted without objection, by other statements made by him, giving a different opinion; since the conclusions of the witness were incompetent, and not within the rule of impeaching a witness by contradictory statements made out of court. *Norman v. Shipowners Stevedore Co.* 244

3. WITNESSES—IMPEACHING OWN WITNESS—DISCRETION OF COURT. Where a witness was proceeding under a misunderstanding, or counsel had been misled or deceived as to what the witness would testify to, it is proper to allow counsel to ask whether the witness had not made contradictory statements at other times or places, thereby leading or tending to impeach the witness; and in no case should it be held prejudicial unless the court clearly abused its discretion. *Hackett v. Scott* 390

WOODS AND FORESTS:

Cutting and floating of logs, see LOGS AND LOGGING.

WORK AND LABOR:

Contracts of employment, see MASTER AND SERVANT, 1, 3, 14.
Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR—MONTHLY SERVICES—LOST TIME. A traveling salesman employed by the month cannot recover for services during time lost by reason of his sickness. *MacFarlane v. Allan-Pfeiffer Chemical Co.* 154

WRITINGS:

Opinion evidence as to lost signature, see EVIDENCE, 9.

WRITS:

See INJUNCTION; PROCESS; REPLEVIN.

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